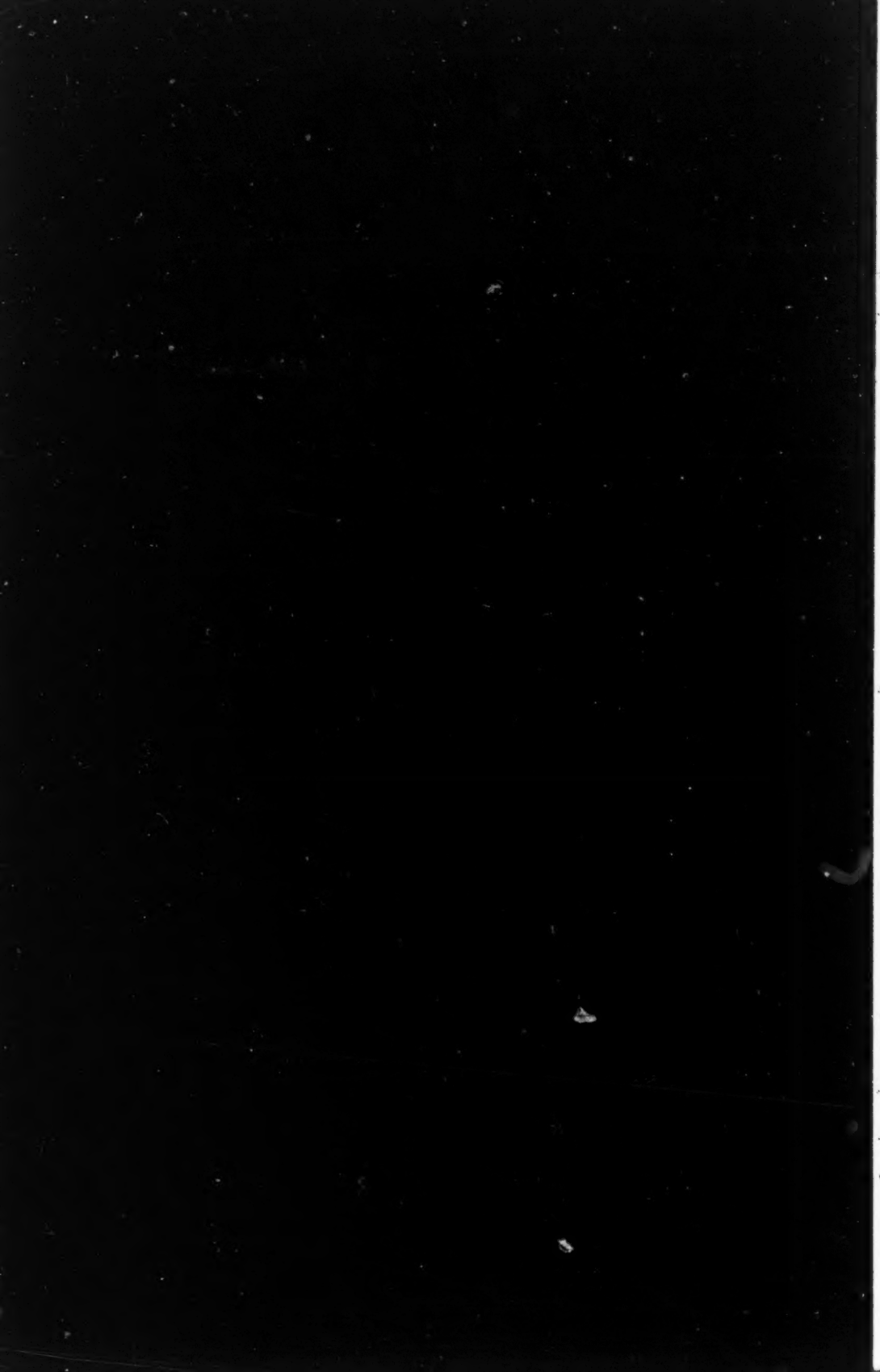
BLANK

PAGE



BLANK

PAGE

INDEX

61317—38——1

CITATIONS

Cases:

Cases—Continued. Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —, ORIGINAL

THE STATE OF CALIFORNIA, COMPLAINANT

v.

MURRAY W. LATIMER, JAMES A. DAILEY, AND LEE M. EDDY, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD RETIREMENT BOARD, AND GUY T. HELVERING, INDIVIDUALLY AND AS COMMISSIONER OF INTERNAL REVENUE, DEFENDANTS

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE THE BILL OF COMPLAINT SHOULD NOT BE GRANTED

RESPONSE TO THE RULE TO SHOW CAUSE

Now come the defendants above-named, by the Solicitor General, and for their response to the rule to show cause issued by this Court on April 11, 1938, say that the motion for leave to file the bill should not be granted, for the following reasons:

1. The Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad have not been joined as defendants. They are indispensable parties in whose absence the Court should not proceed.

2. The cause is not maintainable in this Court, since the Collector of Internal Revenue for the First District of California, a citizen of California, should be made a party, and to join him would deprive the Court of original jurisdiction.

3. The cause is not maintainable in this Court, since the employees of the State Belt Railroad, citizens of California, should be made parties, and to join any of them would deprive this Court of original jurisdiction.

4. The proposed bill of complaint is without equity because it appears from the allegations thereof that the complainant will suffer no injury, irreparable or even substantial, from any action taken or threatened by the defendants.

5. Complainant has an adequate and complete legal remedy through the payment of the questioned taxes which have accrued under the Carriers Taxing Act of 1937, followed by a suit for a refund.

6. Maintenance of the suit is prohibited by Section 3224 of the Revised Statutes.

7. The United States is the real party in interest and hence an indispensable party. It may not be sued without its consent and has not consented to this suit.

8. The issues presented by complainant have been clearly decided against it by previous decisions of this Court, and a re-examination of those contentions would serve no useful purpose.

And in support of this response, the defendants ask leave to file the brief hereto attached.

Wherefore, the defendants pray that the motion for leave to file the proposed bill be denied and the rule discharged.

ROBERT H. JACKSON,
Solicitor General.

APRIL 1938.

BRIEF ON BEHALF OF THE DEFENDANTS, IN SUPPORT OF THEIR RESPONSE TO THE RULE

JURISDICTION

The motion was submitted April 4, 1938. The rule to show cause issued April 11, 1938, returnable on or before April 25, 1938.

Jurisdiction is asserted under the Constitution of the United States, Article III, Section 2, Clause 2. The existence of jurisdiction is disputed.

QUESTIONS PRESENTED

1. Whether the Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad are indispensable parties in whose absence the Court should not proceed.

2. Whether to join the Collector of Internal Revenue for the First District of California, a California citizen, would deprive this Court of original jurisdiction.

3. Whether to join the employees of the State Belt Railroad, some of whom are citizens of California, would deprive this Court of original jurisdiction.

4. Whether the bill of complaint alleges facts to show that the complainant will suffer irreparable injury from any action taken or threatened by the defendants.

5. Whether complainant has an adequate legal remedy through the payment of the taxes accrued under the Carriers Taxing Act of 1937, followed by a suit for refund.

6. Whether this suit is prohibited by Section 3224 of the Revised Statutes.

7. Whether the United States is an indispensable party which cannot be joined because it has not consented to be sued.

8. Whether this Court should deny leave to file the bill of complaint for the reason that all of the issues which it presents have been decided adversely to the complainant by previous decisions of this Court.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent section of the Constitution and the statutes involved are set forth in the Appendix.

STATEMENT

This is a motion by the State of California for leave to file an original bill of complaint.

The defendants, who are sued both individually and in their respective official capacities, are the Chairman of the Railroad Retirement Board, who is alleged to be a citizen of the State of New York; the other two members of the Railroad Retirement Board, one of whom is alleged to be a citizen of the State of New York and the other of whom is alleged to be a citizen of the State of Missouri; and the Commissioner of Internal Revenue, who is alleged to be a citizen of the State of Kansas (Bill, p. 9).

Complainant owns and operates the line of railroad, known as the State Belt Railroad, along the San Francisco waterfront. The proposed bill seeks to enjoin the enforcement against complainant of the Carriers Taxing Act of 1937, the Railroad Retirement Act of 1937, and the Railroad Retirement Act of 1935. It further seeks to enjoin the members of the Railroad Retirement Board from certifying for payment or authorizing the payment of any annuity, benefit, or award accruing under the Railroad Retirement Acts to or with respect to any employee of complainant (Bill, pp. 29 to 32). The ground for this relief is the alleged inapplicability of the three Acts in question to the State Belt Railroad. It is not entirely clear whether complainant is raising solely the question of statutory construction or whether it likewise raises the question of the constitutionality of these Acts, if held applicable to it. The bill, however, does allege that taxes under the Carriers Taxing Act of 1937 "cannot be imposed upon complainant, State of California, or upon the State Belt Railroad without violating the fundamental implied constitutional doctrine of the reciprocal immunity from taxation of the governmental functions, agencies and instrumentalities of the states and the United States respectively" (Bill, p. 20).

The three Acts in question are printed in full in the Appendix.

In general, the Carriers Taxing Act of 1937 imposes an excise tax on carriers by railroad subject

to Part I of the Interstate Commerce Act, and an income tax upon the employees of such carriers. In general, the Railroad Retirement Act of 1937 and the Railroad Retirement Act of 1935 provide for the payment by the United States of annuities and other benefits to or with respect to employees of carriers subject to Part I of the Interstate Commerce Act who meet the requirements of the said Acts for such payments. These requirements in general deal with age, service in the employ of an "employer" as defined in the Acts, and relinquishment of rights to be in the service of such an employer and of the person by whom he was last employed. The amount of the payments is based upon the years of service of the individual in the employ of an "employer" and the compensation earned during such period.

The following allegations are contained in the bill which complainant seeks to file:

The complainant for about forty-five years has operated, without any profit and for the purpose of facilitating the commerce of the port of San Francisco, the State Belt Railroad, which is located upon real property owned by complainant on the waterfront of the City and County of San Francisco. The railroad has a physical connection with the tracks of the Southern Pacific Company and also runs onto forty-five wharves owned by the State of California and used by freight car ferries of four common carriers engaged in interstate commerce

by railroad. The State Belt Railroad also connects with certain freight yards owned by the State of California and used by the four carriers. In addition, it has connections with and serves about one hundred seventy-five industries located on its line, and has trackage rights over certain tracks of the Southern Pacific Company for the purpose of interchanging cars. The State of California owns no cars. None of the tracks of the State Belt Railroad is used by any other carrier except for interchanging cars, and no locomotives except those of the State Belt Railroad move over any part of such tracks (Bill, pp. 10–15).

The State Belt Railroad has been administered through the Board of State Harbor Commissioners for San Francisco Harbor, who appoint and supervise superintendents to operate the Railroad. All persons employed in the operation of the State Belt Railroad are appointed under the California Civil Service Act and are officers and employees of the State (Bill, pp. 12–13).

The employees of the State Belt Railroad are members of the State Employees' Retirement System of the State of California, which has as its members the officers and employees of the State. It provides a pension system for State employees, for monthly deductions at specified rates from the compensation of the members of the system, and for the payment of such deductions into the "State Employees' Retirement Fund." Into this fund

the State contributes 3.75 per centum of the compensation of members of the system who are paid from certain State funds, including the San Francisco Harbor improvement fund (Bill, pp. 15–16).

Sections 29 and 38b of the State Employees' Retirement Act provide that persons who are members of any retirement system or pension system supported wholly or in part by funds of the United States Government and who are receiving credit in such other system for service, shall not be members of the State Retirement System of California (Bill, p. 16).

The bill alleges that the Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937, and the Carriers Taxing Act of 1937 constitute a single legislative enactment, having for its sole purpose the establishment of a pension system making provision for annuities, disability, and death benefits to the members thereof (Bill, p. 20). The bill alleges that the defendant members of the Railroad Retirement Board have notified the complainant in writing of their decision that the Railroad Retirement Acts apply to the State Belt Railroad (Bill, p. 21), and that the defendant Commissioner of Internal Revenue has notified the complainant in writing that the Carriers Taxing Act of 1937 applies to that railroad (Bill, p. 22).

The right to equitable relief is predicated upon the following allegations: The members of the Railroad Retirement Board have threatened to re-

quire the complainant to gather and keep records of the employees of the State Belt Railroad, to do which would "put complainant to great expense," and to enforce "certain penalties" against the complainant, if it refuses to gather and keep such records (Bill, pp. 21, 22, and 27). The Commissioner of Internal Revenue has threatened to and will enforce the collection of taxes accrued under the Carriers Taxing Act of 1937 and will subject complainant and its agents to heavy fines and penalties if it fails to pay the same (Bill, pp. 22–24). The bill recognizes that these penalties may be avoided by paying the taxes (which amount, in the case of the complainant, to $7,862.32 per year) followed by a suit for refund (Bill, p. 24). The bill alleges that this legal remedy is inadequate by reason of the delay involved, the multiplicity of suits for refund which complainant would be required to institute, the multiplicity of claims and demands from its employees with which it would be faced in the interim, and the difficulties which it would encounter in raising the funds necessary to pay tax accruals (Bill, pp. 24 to 28).

SUMMARY OF ARGUMENT

I

This Court, sitting as a court of equity, should decline to assume jurisdiction, since neither the Collector of Internal Revenue nor any of the employees of the State Belt Railroad have been joined as parties.

A. The bill of complaint asks for an injunction against the collection of taxes imposed by the Carriers Taxing Act of 1937. However, it is the Collector of Internal Revenue, and not the Commissioner of Internal Revenue, who is charged by law with the duty of collecting these as well as all other internal revenue taxes. Nor is the Collector a mere subordinate of the Commissioner. He is appointed by the President and derives his authority from Congress. Accordingly the Collector is an indispensable party to any suit seeking an injunction against the collection of the taxes here in question.

B. The employees of the State Belt Railroad are also indispensable parties, since complainant seeks an adjudication that they are not entitled to any of the benefits of the Railroad Retirement Acts, as well as a decree restraining the Railroad Retirement Board from making such benefits available. While such a decree would not technically be *res judicata* against them, it would effectively preclude them from successfully asserting any rights under those Acts. Under like circumstances, this Court has declined to assume original jurisdiction at the instance of a state where to do so would substantially affect the interests of persons not before the Court. The rights of the absent parties will not be protected by the presence of the State, since their interests may be antagonistic to the rights asserted by the State.

II

The request for leave to file the bill of complaint should be denied, since the cause is not within the original jurisdiction of this Court. Such jurisdiction does not extend to suits by a State against its own citizens or to suits to which its citizens are indispensable parties defendant. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 262.

Accordingly, since the Collector of Internal Revenue for the First District of California is an indispensable party, and since he is presumably a resident of California (the statutory qualifications for the office of Collector require that each be a resident of his district), the complainant has failed to exhibit a bill falling within the original jurisdiction of this Court. Original jurisdiction is similarly lacking because some of the employees of the State Belt Railroad may also be presumed to be citizens of California.

III

No basis for equitable relief is shown in the proposed bill.

A. No action has been taken or proposed to be taken by any of the three members of the Railroad Retirement Board which in any way threatens irreparable injury to complainant. The supposed injury is said to arise from a threat of these defendants to require complainant to keep certain records of the employees of the railroad and to

enforce "certain penalties" if it refuses to keep such records. Those general allegations, made without supporting facts, presumably have reference to Section 10 (b) (4) of the Railroad Retirement Act of 1937. But that provision merely authorizes the Board to require the maintenance of records, etc. Not only is there no allegation that Board has issued any order under this section, but such an order, even when issued, cannot operate as a threat of irreparable injury. Although the Board may institute a proceeding in the District Court to enforce such an order, complainant would then have an adequate remedy by setting up the alleged illegality of the order as a defense in that proceeding.

To the extent that complainant desires protection against the imposition of any penalties provided for in Section 13 of the Railroad Retirement Act of 1937, it is clear that such relief can be obtained, if at all, only against the United States Attorney. Neither the Board nor its members are authorized to bring criminal proceedings. Moreover, even a threat of criminal prosecution made by the appropriate officer is not sufficient to confer equity jurisdiction, in the absence of threats of a multiplicity of prosecutions. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 95. Finally, it is clear that the burden of gathering and maintaining such records is so insubstantial that a court of equity should not intervene to relieve the complainant of that burden.

B. Nor is any action threatened by the defendant Commissioner of Internal Revenue which requires equitable relief. The gist of the complaint is that this defendant will collect an allegedly invalid tax and that there is no adequate remedy at law. That position is without foundation on both grounds. Not only is the Commissioner without statutory authority to collect (see Point I A, *supra*), but there is a plain remedy at law in a suit for refund. There are no special circumstances in this case to remove it from the general doctrine that a suit to enjoin the collection of a tax will not lie, if the taxpayer may upon payment bring suit at law for its recovery.

IV

Section 3224 of the Revised Statutes prohibits the maintenance of this suit. It is fully applicable to forbid even those suits in which it is alleged that the tax sought to be enjoined is unconstitutional. *Bailey* v. *George*, 259 U. S. 16. This complaint does not set forth any exceptional and extraordinary circumstances which could be thought sufficient to avoid Section 3224. And since that section is not only a regulation of jurisdiction but is also a substantive rule of equity practice, it is fully applicable to original proceedings in this Court.

V

The allegations of the bill make it clear that the four individuals who are the nominal defendants

in this suit are sued only because they are officials of the United States. They have no individual interest in the enforcement of these statutes. Therefore, the United States itself is the real party defendant in this cause. Since it may not be sued without its consent, this action may not be maintained.

VI

Finally, the issues presented by complainant have been so clearly decided against it by previous decisions that it should not be permitted to file this bill. That the Railroad Retirement Acts and the Carriers' Taxing Act are applicable to complainant is made plain by *United States* v. *California,* 297 U. S. 175, 186. And it is equally clear that the State is not entitled to any constitutional immunity from taxation with respect to the State Belt Railroad. *United States* v. *California, supra; Board of Trustees* v. *United States,* 289 U. S. 48; *Helvering* v. *Powers,* 293 U. S. 214.

ARGUMENT

I

THE COLLECTOR OF INTERNAL REVENUE AND THE EMPLOYEES OF THE STATE BELT RAILROAD ARE INDISPENSABLE PARTIES TO THIS PROCEEDING

A. *The Collector of Internal Revenue is an Indispensable Party*

The bill of complaint alleges (p. 22) that the Commissioner of Internal Revenue has threatened

to, and unless enjoined will enforce the collection of taxes, and penalties for non-payment thereof, from the complainant pursuant to the Carriers Taxing Act of 1937. The bill prays (p. 31) that the Commissioner be enjoined from collecting or attempting to collect such taxes.

It clearly appears, however, from the Carriers Taxing Act itself and from other pertinent statutory provisions that the Commissioner of Internal Revenue has neither the power nor the authority to perform the acts complained of. It further appears from the regulations issued by the Commissioner of Internal Revenue, pursuant to that Act, that he has not asserted any such power or authority. The plain fact is that the duty of collecting taxes under the Carriers Taxing Act of 1937 has been lodged by the Congress, not with the Commissioner of Internal Revenue, but with the Collectors of Internal Revenue acting in their several districts.

The Collectors of Internal Revenue are specifically charged by law with the collection of *all* internal revenue. It is provided that—

> It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, *however the same may be designated* (R. S., Sec. 3183, U. S. C., Title 26, Sec. 1541). [Italics ours.]

Penalties and interest are also to be collected by the Collector. (See R. S., Sec. 3185, U. S. C., Title 26, Sec. 1430 (c)–(e); R. S., Sec. 3176, U. S. C.,

Title 26, Sec. 1512 (d)-(e); R. S., Sec. 3213, U. S. C., Title 26, Sec. 1645 (a).) These statutory provisions clearly authorize the Collector of Internal Revenue to collect the taxes and penalties here in question to the exclusion of the Commissioner.

There is nothing in the Carriers Taxing Act of 1937 which qualifies these express statutory provisions, applicable generally to all taxes. Section 7 (a) of that Act declares that the taxes imposed "shall be collected by the Bureau of Internal Revenue." It is apparent that Congress did not intend by this provision to render inapplicable the general statutory provisions above referred to. It was merely making available to revenue accruing under that Act the usual administrative machinery for the collection of internal revenue taxes, including that portion of such machinery which authorizes the Collectors of Internal Revenue to make the actual tax collections. Nor do the provisions of Section 7 (b) of the Act, which authorize the Commissioner to prescribe regulations affecting the collection of taxes due thereunder, impose any duty or confer authority upon him to make collections. Similar provisions are applicable to Federal taxes generally. Accordingly, while the Commissioner may promulgate regulations, the actual collections must be made by the Collector.

Any possible doubt as to the authority of the Collector, to the exclusion of the Commissioner, to collect the questioned taxes is dispelled by Section

7 (c) of the Carriers Taxing Act. That section incorporates by reference the provisions of Section 602 of the Revenue Act of 1926, c. 27, 44 Stat. 9, which reads:

> Every person liable for any tax * * * shall make * * * returns under oath * * * *and pay the taxes* * * * *to the collector for the district in which is located the principal place of business.* Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.
>
> The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable *to the collector* at the time so fixed for filing the retur. * * * [Italics ours.]

Not only do the foregoing statutory provisions expressly charge the Collectors of Internal Revenue with the duty of collecting taxes, but the Commissioner does not now have no. has he ever had administrative machinery for performing that function. Accordingly, he has not only made no threat to collect taxes or penalties from the complainant here, but by his regulations has specifically recognized that taxes accruing under the Carriers Taxing Act of 1937 are payable to the several Collectors of Internal Revenue (Articles 505 and 506 of Regulations 100).

Nor can it be said that the Collector of Internal Revenue is a subordinate official exercising an au-

thority delegated to him by the Commissioner of Internal Revenue and hence that the latter is the proper officer to be sued. It is true that the Collector is, in a sense, an official in the Bureau of Internal Revenue of which the Commissioner is the chief officer. Yet he does not derive his authority to collect taxes from the Commissioner for, as we have seen, that authority flows directly from Congress itself. Nor does he owe his appointment to the Commissioner. He is appointed by the President with the advice and consent of the Senate (R. S., Sec. 3142, U. S. C., Title 26, Sec. 1731 (a)). Not only is he required by statute to collect taxes but the general duty to enforce internal revenue laws in his district devolves upon him by virtue of congressional mandate (R. S., Sec. 3163, U. S. C., Title 26, Sec. 1544 (a)). He is accountable for all monies collected by his deputies, and is responsible for every act done or neglected to be done by them in their official capacity (Act of February 8, 1875, c. 36, 18 Stat. 307, Sec. 12, as amended; U. S. C., Title 26, Sec. 1544 (b)). He is directed to make the tax return of a taxpayer who fails to make his own return or who makes a false or fraudulent return (R. S., Sec. 3176, U. S. C., Title 26, Secs. 1512, 1524). Further, he may sue on behalf of the Government and be sued as an officer of the Government without in either case joining the Commissioner as a party. Cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373.

The Collector is thus very differently situated from the subordinate officers sued in *Gnerich* v. *Rutter*, 265 U. S. 388, and *Webster* v. *Fall*, 266 U. S. 507, where this Court held that the suits could not proceed in the absence of the superior officers. In those cases the defendant subordinates derived their sole authority from their superiors who were charged by law to perform the acts in question and had delegated those duties to their subordinates. In the present case, however, the tax collecting power of the Collector stems directly from Congress and not from the Commissioner of Internal Revenue.

We accordingly submit that since the Collector of Internal Revenue for the First District of California [1] has exclusive power and authority to collect the taxes and penalties here sought to be enjoined he is, therefore, an indispensable party to the proceeding. Leave to file the bill of complaint should therefore be denied. As was said in *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, 455 (C. C. A. 4th), certiorari denied, 291 U. S. 674:

> Suit will not be entertained to enjoin the enforcement of an unconstitutional act or

[1] San Francisco is included in the collection district designated the First District of California. See publication of the United States Treasury Department (Bureau of Internal Revenue), entitled "Internal Revenue Collection Districts (corrected to April 1, 1938)." Collection districts were presumably established by the President in accordance with R. S., Sec. 3141, U. S. C., Title 26, Sec. 1540.

order when not brought against the official charged with its enforcement.

B. *The Employees of The State Belt Railroad are Indispensable Parties*

The bill of complaint seeks an adjudication that the Railroad Retirement Acts of 1935 and 1937 do not authorize any awards, payments, or annuities to employees of the State Belt Railroad and seeks to enjoin the Railroad Retirement Board from making or certifying any award or payment to such employees or from supplying the Treasury Department with any information for the purpose of making annuity or other payments to such employees (Bill, p. 29–31).

In substance, therefore, the complainant is seeking an adjudication by this Court that its employees are not entitled to any of the benefits of the Railroad Retirement Acts and an injunction which would restrain the Railroad Retirement Board from making such benefits available. Such an adjudication and decree are sought in a proceeding to which none of complainant's employees are parties and in which no opportunity is given them to assert their rights and interests. It is true that a decree in this proceeding would not technically be *res judicata* against the employees of the State Belt Railroad. However, realistically the effect of a decree by this court granting complainant the relief which it prays will be to adjudicate the rights

of its employees and to preclude them thereafter from successfully asserting their right to participate in the benefits of the Railroad Retirement Acts.

Such an adjudication, made in the absence of the employees affected would render nugatory the right expressly granted them by Section 11 of the Railroad Retirement Act of 1937 to bring suit in the District Court to compel the Board to set aside any action or decision claimed to be in violation of the legal rights of an employee or to take action or make a decision necessary for the enforcement of his legal rights.

It is submitted that under these circumstances this Court will not proceed to adjudicate the issues in the absence of the employees themselves who would be directly and immediately affected by such an adjudication.

In analogous cases this Court has refused to assume original jurisdiction at the suit of a state where the interests of persons not before the court would be substantially affected by its decision. *California* v. *Southern Pacific Co.*, 157 U. S. 229; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199; *New Mexico* v. *Lane*, 243 U. S. 52; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158. See also *Barney* v. *Baltimore*, 6 Wall. 280; *New Orleans Water Works Co.* v. *New Orleans*, 164 U. S. 471.

61317—38——4

In *Texas* v. *Interstate Commerce Commission, supra,* the State of Texas filed an original bill seeking an adjudication that Titles III and IV of the Transportation Act of 1920 (41 Stat. 456, 469, 474, c. 91) were unconstitutional, the annulment of action theretofore taken thereunder, and an injunction against further action, all with respect to carriers operating in the State of Texas. The sole defendants were the Interstate Commerce Commission and the Railroad Labor Board. The Court declined to entertain the proceeding upon the ground that the Texas carriers and their employees would be so affected by the decree that their presence was indispensable. In dismissing the bill of complaint this court stated (p. 163):

> To take up and solve the controversy without their presence and without their being represented would be quite inadmissible, considering the exceptional nature of our original jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 245.

The presence of the State as a complainant does not protect the rights of the absent parties since the interest of the state may be antagonistic to that of the parties not represented in the proceeding, and the state cannot claim to represent both sides of a controversy. *Minnesota* v. *Northern Securities Co.,* supra; *Texas* v. *Interstate Commerce Commission,* supra.

We, therefore, submit that the interests of the employees of the State Belt Railroad in the subject matter of this proceeding and in any decree which this Court might make are so immediate and direct that they, as well as the Collector of Internal Revenue, are indispensable parties in whose absence the Court should not proceed.

II

THE COLLECTOR OF INTERNAL REVENUE AND AT LEAST SOME OF THE EMPLOYEES OF THE STATE BELT RAILROAD ARE PRESUMABLY CITIZENS OF CALIFORNIA. TO JOIN THEM AS PARTIES DEFENDANT WOULD DEPRIVE THE COURT OF JURISDICTION

We have shown under Point I that the Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad are indispensable parties to this proceeding. Under established rules of practice this deficiency of indispensable parties means that the suit may not be maintained. In this section we shall show that this defect of parties also operates to oust this Court of jurisdiction.

The statute providing the qualifications for the office of Collector requires that each be a resident of his district (R. S., Sec. 3142, U. S. C., Title 26, Sec. 1731 (a)). It will be presumed that this requirement was met in the appointment of the Collector for the First District of California and that he in a citizen of that State. In the absence of any

allegation to the contrary, it may also be presumed that at least some of the employees of the State Belt Railroad are citizens of California. Cf. *New Mexico* v. *Lane,* 243 U. S. 52.

To join these California citizens as parties defendant would defeat the jurisdiction of this court. The court's original jurisdiction depends wholly upon the character of the parties, and in the instant proceeding is predicated upon the fact that the State of California is the complainant. But it is well settled that such original jurisdiction does not embrace suits by a state against its own citizens. *Cohens* v. *Virginia,* 6 Wheat. 264, 393–394; *Pennsylvania* v. *Quicksilver Company,* 10 Wall. 553; *California* v. *Southern Pacific Co.,* 157 U. S. 229, 257–258, 261.

Where it appears that indispensable parties defendant are absent, it is the usual practice to permit the complainant to amend in order to bring them in. Where, however, it is apparent that the presence of such parties would defeat the original jurisdiction of this court, the bill of complaint will be dismissed. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 257–262; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 246–247; *New Mexico* v. *Lane, supra,* 52, 58; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 163–164.

In *California* v. *Southern Pacific Co.,* supra, the State of California attempted to invoke the original jurisdiction of this court in a suit against a Kentucky corporation. Upon an examination of

the bill of complaint, the Court found that the City of Oakland, California, and the Oakland Water Front Company, a California corporation, had interests in the subject matter of the litigation which would substantially be affected by an adjudication against the Kentucky corporation. It concluded that although these California citizens would not technically be bound by the decree, their interest was such as to make them indispensable parties. It, therefore, dismissed the bill saying (p. 262):

> We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of the parties who should be joined, but cannot be without ousting the jurisdiction.

Accordingly, we submit that leave to file the bill of complaint must be denied since citizens of California are indispensable parties to the proceeding and to bring them in would deprive this Court of jurisdiction.

III

THE BILL OF COMPLAINT IS WITHOUT EQUITY BECAUSE ITS ALLEGATIONS SHOW THAT THE COMPLAINANT WILL SUFFER NO INJURY, IRREPARABLE OR EVEN SUBSTANTIAL, FROM ANY ACTION TAKEN OR THREATENED BY THE DEFENDANTS. COMPLAINANT HAS AN ADEQUATE AND COMPLETE LEGAL REMEDY THROUGH PAYMENT OF THE TAXES FOLLOWED BY A SUIT FOR REFUND

The only actions alleged by the bill to have been taken by any of the defendants with reference to

the complainant are the letters from the General Counsel of the Railroad Retirement Board and from the Commissioner of Internal Revenue (Bill, pp. 34 and 37) written in response to an inquiry of the complainant, announcing the decision of the Board and of the Commissioner that the Railroad Retirement Acts of 1935 and 1937 and the Carriers Taxing Act of 1937 are applicable to the State Belt Railroad. Neither of these letters contains any threat of action against the complainant, and it is clear that the determinations made by the Board and the Commissioner do not of themselves constitute any injury to it. This fact is apparently recognized in the bill of complaint which further alleges certain threatened conduct on the part of the defendants as the basis for the exercise of equity jurisdiction by this Court.

The supposed irreparable injury is said to arise as follows: (1) The members of the Railroad Retirement Board have threatened to require the complainant to gather and keep records of the employees of the railroad which would "put complainant to great expense" and to enforce "certain penalties" against the complainant if it refuses to gather and keep such records (Bill, pp. 21, 22, and 28). (2) The Commissioner is threatening to collect taxes accrued under the Act in the annual sum of $7,862.32, and complainant will be exposed to fines, penalties, and imprisonment for willful failure to pay such taxes, deduct an equal sum from the

compensation of its employees, or keep the records and supply the information required. These penalties, complainant admits, can be avoided by payment of the taxes followed by a suit for refund, but it alleges that that remedy is inadequate (Bill, pp. 23–27).

It is submitted that, upon analysis, it will appear that neither of the foregoing assertions constitutes any substantial basis in fact or law for a claim of irreparable injury or that the complainant's legal remedy through payment of the taxes and a suit for a refund is not entirely adequate. It results that there is no basis in the bill of complaint for the jurisdiction of a court of equity.

A. *Complainant is not Exposed to Any Injury, Irreparable or Otherwise, from Any Threatened Action by the Members of the Railroad Retirement Board*

Complainant's general allegation, made without supporting facts, that the defendant members of the Railroad Retirement Board have threatened to and, unless enjoined, will require the complainant to gather and keep records of the employees of the State Belt Railroad can refer only to the exercise by the Board of the authority conferred upon it by Section 10 (b) 4 of the Railroad Retirement Act of 1937:

> The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the

> United States to furnish such information and records as shall be necessary for the administration of such Acts.

It is not alleged that the Board has issued any order under this section. It is clear that an order, when issued, will constitute no threat of irreparable injury calling for the exercise of equity jurisdiction.

Section 10 (b) 4 further provides that orders of this character, like other orders of the Board, may be enforced by it by means of a proceeding instituted in the District Court. If the Board elects to pursue this means to compel obedience to its order, it is clear that complainant will have an entirely adequate remedy by asserting the alleged illegality of the order as a defense in the enforcement proceedings.

Complainant also alleges, however, that if it fails to gather and keep records of its railroad employees, the defendant members of the Railroad Retirement Board will enforce against it, its officers, agents, and employees, "certain penalties" (Bill, p. 22). Presumably the penalties to which the complainant refers are those imposed by Section 13 of the Railroad Retirement Act of 1937 which provides:

> Any officer or agent of an employer, as the word "employer" is hereinabove defined, or any employee acting in his own behalf, or any individual whether or not of the char-

> acter hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of Section 10 (b) 4, by the Board in the administration of this Act or the Railroad Retirement Act of 1935 * * * shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year.

Complainant's allegation, therefore, amounts to nothing more than the existence of a possibility that it, its officers, agents or employees may, at some future date, be prosecuted under the provisions of this section. Such an allegation falls far short of the requirements for equity jurisdiction for the following reasons:

1. The Board is not authorized to prosecute criminal proceedings under Section 10 (b) 4 of the Act. That duty rests with the United States Attorney for the Northern District of California who has not been made a party to this proceeding and who cannot be joined without depriving this court of jurisdiction. (See Point II, *supra.*) Since the power to prosecute does not lie with the members of the Railroad Retirement Board, there is no conduct of theirs which the court may enjoin. Compare *Federal Trade Commission* v. *Claire Furnace Company*, 274 U. S. 160.

2. The penalties prescribed by Section 10 (b) 4 are imposed only for the *willful* failure or refusal

to make the required reports or furnish the required information. Under a closely analogous statute this court has held that a refusal made in good faith and based upon an actual belief (even if unfounded) in the illegality of the demand may not be willful. *United States* v. *Murdock*, 290 U. S. 389. In any case, the decision whether complainant's refusal to furnish the required report or information is willful rests, in the first instance, in the discretion of the United States Attorney. At least until that discretion has been exercised there is no foundation for the interposition of a court of equity. *Federal Trade Commission* v. *Claire Furnace Company*, 274 U. S. 160; *Ex parte La Prade*, 289 U. S. 444.

3. If the Railroad Retirement Board does require the complainant to furnish information and records, if the complainant refuses to comply and if thereafter the United States Attorney determines to prosecute, complainant may raise every defense asserted in its bill upon the trial of the criminal case. The courts are without equity jurisdiction to enjoin criminal prosecutions (even under unconstitutional statutes) where, as here, the criminal penalty is not cumulative, there is no threat of a multiplicity of prosecutions, and all of the grounds urged for an injunction may be raised as defenses in the criminal proceeding. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 95.

It is, therefore, apparent that the consequences of the failure or refusal of complainant to keep and maintain records in response to any requirement that the Board may hereafter make are not such as to entitle it to an injunction. It is further true that the burden of gathering and keeping such records and furnishing such reports and information is so insubstantial that a court of equity would in no event relieve the complainant from performing it. Complainant alleges generally that it will be put "to great expense" in obtaining, keeping, and supplying the necessary data. Beyond this there is no allegation of the cost of this effort. The fact is that such cost would be negligible. The regulations of the Railroad Retirement Board with respect to the reporting of current service and compensation are so designed as to permit ready transcription from pay rolls. (Regulations Governing the Preparation of Employer's Reports of Monthly Compensation of Employees and Registration of Employees Subject to the Railroad Retirement Act, Federal Register, Volume 3, p. 22, Sections 4, 6; Cf. State Employees' Retirement Act, Section 67.) Reports of past service and compensation are available and involve simply transcription from records which complainant has long been required to maintain. The State Belt Railroad is a common carrier by railroad, subject to the Interstate Commerce Act (*California Canneries Co.* v. *Southern Pacific Co.*, 51 I. C. C. 500). As such, it

has long been subject to detailed supervision with respect to the maintenance and preservation of accounts and records.[2]

We, therefore, submit that the allegations of the bill of complaint with reference to action threatened by the members of the Railroad Retirement Board establish no basis for equity jurisdiction both because the complainant would suffer no irreparable injury from refusing to comply with the requirements which it is alleged the Board is threatening to make and because compliance with such requirements would result in no substantial injury.

B. *The Alleged Threat of the Commissioner of Internal Revenue to Collect Taxes From the Complainant Exposes It to no Irreparable Injury. Complainant Has an Adequate Legal Remedy Through Payment of the Taxes and a Suit for Refund*

The bill of complaint alleges that the Commissioner of Internal Revenue has threatened to col-

[2] Interstate Commerce Act, Section 20; Act of Feb. 4, 1887, c. 104, Sec. 20, 24 Stat. 386, as amended June 29, 1906, c. 3591, Sec. 7, 34 Stat. 593; June 18, 1910, c. 309, Sec. 14, 36 Stat. 555; Mar. 4, 1915, c. 176, Sec. 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; and Feb. 28, 1920, c. 91, Secs. 434–438, 41 Stat. 493, 494; Rules for Reporting Information on Railroad Employees. United States Railroad Labor Board and Interstate Commerce Commission, April 18, 1921; Regulations to Govern the Destruction of Records of Steam Roads, Interstate Commerce Commission, July 1, 1914. The regulations last cited were amended in 1935 to require the permanent preservation of pay rolls (Amendment of August 1, 1935).

lect taxes accrued under the Carriers Taxing Act of 1937 from the complainant and that if it fails to pay such taxes it and its agents will be exposed to criminal prosecution, fines, and penalties. We have already pointed out that the power to collect these taxes is vested in the Collector of Internal Revenue for the First District of California to the exclusion of the Commissioner and that the Commissioner has recognized this fact. (See Point I A, supra.) Beyond that, it is clear that complainant can avoid any penalties imposed for non-payment by paying the tax and suing for a refund. This Court has long held that a court of equity is without jurisdiction to enjoin the collection of a tax in the absence of special circumstances from which it would appear that payment and suit for a refund would irreparably injure the taxpayer. Cf. *Dows* v. *Chicago,* 11 Wall. 108; *Shelton* v. *Platt,* 139 U. S. 591; *Allen* v. *Pullman's Palace Car Co.,* 139 U. S. 658; *Pittsburgh, etc. Ry.* v. *Board of Pub. Works,* 172 U. S. 32; *Arkansas Building & Loan Association* v. *Madden,* 175 U. S. 269; *Indiana Manufacturing Co.* v. *Koehne,* 188 U. S. 681; *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481. This procedure is not inconsistent with state sovereignty. Other states, in similar situations, have heretofore proceeded in the ordinary way. *South Carolina* v. *United States,* 199 U. S. 437; *Board of Trustees* v. *United States,* 289 U. S. 48.

The bill of complaint concedes the principle stated in the foregoing authorities. It attempts to avoid the force of that rule by alleging supposed special circumstances which would cause it to suffer irreparable damage by paying the taxes and suing for refund.

It first alleges that such a course would delay the final adjudication of the validity of the taxes (Bill, pp. 24 and 25). But the fact that an otherwise adequate legal remedy may not be expeditious does not warrant the assumption of jurisdiction by equity unless the delay will be accompanied by irreparable injury to the complainant. Further it appears here that the taxes imposed by the Carriers Taxing Act for the first three quarters of 1937 became due at approximately the same time that complainant requested the Commissioner of Internal Revenue to determine the applicability of the Carriers Taxing Act of 1937 to the State Belt Railroad.* Had the complainant paid the tax and filed its claim for refund at that time it is reasonable to suppose that its claim would have been passed upon as promptly as its request for a decision was responded to and that it would, therefore, have had a

*The tax for the first three quarters of 1937 was due November 30, 1937 (United States Treasury Regulations 100, Articles 505–506). The complainant made its request to the Commissioner of Internal Revenue on November 13, 1937 (Bill, page 37).

ruling on its claim by February 19, 1938.* Complainant would then have been in a position to file its suit for refund in accordance with the usual procedure. Thus any urgency which it now asserts is entirely attributable to its own failure to pursue its legal remedy expeditiously.

Further to support its allegation that its legal remedy is inadequate, complainant alleges that the tax imposed upon it is "a very heavy tax" (Bill, p. 26). It appears that this tax in fact amounts to $7,862.32 per year (Bill, p. 26).

It is further alleged by way of conclusion and without supporting facts that this amount, if collected by the Government, must be supplied from charges may by the complainant in the administration of San Francisco Harbor. No facts are stated to show that payment of the tax is not possible from other funds, and, in their absence, it can scarcely be assumed that payment of the amount stated would subject the State of California to financial embarrassment. Similarly, it is alleged that the payment of the tax would require a revision of the tariffs of the Board of Harbor Commissioners. But again no facts are stated showing an insufficiency of funds, even in the San Fran-

* In any event, complainant could have filed suit within six months after filing its claim with the Commissioner, even if the Commissioner had not acted upon it within that period (R. S., Sec. 3226, as amended by Sec. 1103, Revenue Act of 1932).

cisco Harbor improvement fund, to meet the amount of the tax pending the decision of a suit for refund. On the contrary, the bill of complaint alleges (p. 15) that all employees of the State Belt Railroad are members of the State Employees' Retirement System of the State of California. It appears, however, from Section 38 (b) of the State Employees' Retirement Act (Exhibit D to the proposed bill of complaint) that these employees are not members of the State Employees' Retirement System if they are determined to be employees under the Railroad Retirement Acts. It appears from Section 109 of the State Employees' Retirement Act that if complainant is correct in its contention that it is not an employer subject to the Railroad Retirement Acts and the Carriers Taxing Act, then complainant will be required to pay into the State Employees' Retirement Fund from the San Francisco Harbor improvement fund an amount equal to 3.75% of so much of the compensation of its employees as does not exceed $416.66 per month for each employee. This amount is substantially in excess of the taxes imposed by the Carriers Taxing Act, Section 3 (a). Likewise, it appears from Section 67 of the State Employees' Retirement Act that if complainant is correct in its contention that it is not an employer under the Carriers Taxing Act and the Railroad Retirement Acts, it is required to deduct from the compensation of its employees and to pay into the State Employees' Retirement Fund

an amount not determinable from the face of the Act but which appears to be in excess of the amount which it would be required to deduct under the Carriers Taxing Act, Section 2.

It is thus apparent that in any event the complainant must adjust its affairs to meet either the taxes levied under the Carriers Taxing Act of 1937 or the substantially equivalent charges required under the State Employees' Retirement Act.

Complainant further alleges that pursuit of its legal remedy would put it to the trouble of quarterly payment of taxes, claims for refund and suits for recovery; that it would expose it to claims by its employees to their rights and privileges under the State Employees' Retirement System and for amounts deducted from their compensation pursuant to the Carriers Taxing Act of 1937. These claims come to nothing more than the inconvenience caused by a temporary uncertainty as to the applicability of the Federal or, in the alternative, the State plan for employees' benefits and the consequent necessity of the maintenance of proper accounts in order that the funds may ultimately be disposed of in accordance with the provisions of the law finally determined to be applicable. It is clear, however, that the inconveniences with which the complainant is now confronted are far from amounting to such irreparable injury as would warrant this court in exercising its extraordinary jurisdiction to enjoin the collection of taxes.

IV

THIS SUIT IS PROHIBITED BY SECTION 3224 OF THE REVISED STATUTES

It has already been shown (Part III, A) that any burdens imposed upon complainant by the Railroad Retirement Act are insubstantial; the essence of the proposed proceeding is a suit to enjoin the collection of taxes imposed by the Carriers Taxing Act of 1937. But, apart from the fact that the bill alleges no facts sufficient to invoke the equity jurisdiction of this court, such relief is specifically forbidden by Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 1543) which provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

1. This provision extends to the collection of all Federal taxes, even though the challenge to their validity is made upon constitutional grounds. *Snyder* v. *Marks*, 109 U. S. 189, 192; *Dodge* v. *Osborn*, 240 U. S. 118, 121; *Graham* v. *Du Pont*, 262 U. S. 234, 257. In *Bailey* v. *George*, 259 U. S. 16, this Court applied Section 3224 in denying an injunction against the collection of the Federal child labor tax, although on the same day it declared that tax unconstitutional in another case (*Bailey* v. *Drexel Furniture Company*, 259 U. S. 20). This established doctrine was not overruled *sub silentio* in

Rickert Rice Mills v. *Fontenot*, 297 U. S. 110. That case, under circumstances not unlike those of *Dodge* v. *Brady*, 240 U. S. 122, 126, merely determined that an injunction against the collection of a tax would be directed where it served to put an end to unnecessary litigation. In several cases this Court has, subsequent to the *Rickert Rice Mills* case, denied certiorari to courts which have refused to entertain a bill to enjoin the collection of taxes alleged to be unconstitutional.[5]

2. The complainant sets forth no circumstances which bring it within any of the exceptions to the operation of Section 3224. The tax in question is obviously not a criminal penalty in the nature of a fine. Compare *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386. Nor does the bill set forth exceptional and extraordinary facts which show that collection of the tax would result in financial ruin to the State. Compare *Miller* v. *Nut Margarine Co.*, 284 U. S. 498; *Hill* v. *Wallace*, 259 U. S. 44. Indeed, as we have shown (Point III, B, *supra*), collection of these taxes would not involve any substantial injury to the complainant.

---

[5] *Huston* v. *Iowa Soap Co.*, 85 F. (2d) 649 (C. C. A. 8th), certiorari denied, 298 U. S. 657; *O'Malley* v. *Haskins Bros. & Co.*, 85 F. (2d) 657 (C. C. A. 8th), certiorari denied, 299 U. S. 594; *Steinhagen Rice Milling Co.* v. *Scofield*, 87 F. (2d) 804 (C. C. A. 5th), certiorari denied, 300 U. S. 663; *Sheridan Flouring Mills* v. *Cassidy*, 87 F. (2d) 20 (C. C. A. 10th), certiorari denied, 300 U. S. 664.

3. The fact that the proceeding is sought to be brought within the original jurisdiction of this Court does not take the complainant out of the operation of Section 3224. The statute recognizes that "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull* v. *United States,* 295 U. S. 247, 259). Section 3224, devised to meet this need, stems from two Congressional powers. The Section represents a codification and reinforcement of the substantive equity rule against the restraint of tax collections (*State Railroad Tax Cases,* 92 U. S. 575, 613–614); and it represents a regulation of the jurisdiction of the Federal courts (*Dodge* v. *Osborn,* 240 U. S. 118). The fact that Congress might be unable to contract the original jurisdiction of this Court leaves the alternative basis of its power unaffected. It has, of course, power to prescribe both the substantive rules of law and the modes of proceeding applicable to the litigation in all courts, including the original jurisdiction of this Court. *Grayson* v. *Virginia,* 3 Dall. 320; *Florida* v. *Georgia,* 17 How. 478, 491.

It results that the provisions of Section 3224 forbid the maintenance of any suit such as the complainant seeks to bring, and this Court accordingly should deny leave to file the complaint.

V

THIS CAUSE IS NOT MAINTAINABLE IN THIS COURT SINCE THE UNITED STATES IS THE REAL DEFENDANT AND IT MAY NOT BE SUED WITHOUT ITS CONSENT

While the four individuals who are the nominal defendants in this suit are named in their individual as well as their official capacities, it is clear from the allegations of the bill that the actions which complainant seeks to enjoin will injure it, if at all, only by reason of the fact that the defendants are officials of the United States. The defendants have no individual interest in the enforcement of the Railroad Retirement Act and the Carriers Taxing Act. Under such circumstances the United States is the real party in interest and is an indispensable party to this proceeding. *Morrison* v. *Work*, 266 U. S. 481; *Lambert Co.* v. *Baltimore & Ohio Railroad Company*, 258 U. S. 377, 382; *Texas* v. *Interstate Com. Comm.*, 258 U. S. 158, 164; *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485; *Wells* v. *Roper*, 246 U. S. 335; *New Mexico* v. *Lane*, 243 U. S. 52; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Louisiana* v. *Garfield*, 211 U. S. 70, 78; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68, 69; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Kansas* v. *Colorado*, 185 U. S. 125. See *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 118; *Arizona* v. *California*, 283 U. S. 423; *Massachusetts* v. *Mellon*, 262 U. S. 447. Consequently, this suit may not be maintained, for the United States may not be sued

without its consent, even by a State. *Kansas* v. *United States*, 204 U. S. 331, 342.

The cases which hold that a suit against government officials is actually against the United States are not confined to those which hold that when the United States is in possession of property a suit affecting its title may not be brought. In both *Wells* v. *Roper, supra,* and *Louisiana* v. *McAdoo, supra,* the plaintiffs sought to interfere with the performance of official duties by officers of the United States, yet the Court held that those suits, which did not affect the title of the United States to property, were nevertheless in substance suits against the Federal Government. Similarly, in *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, in which a State, by an original bill, sought to enjoin certain railway companies from applying an order of the Interstate Commerce Commission until this Court could review the decision upon which the order was made, the Court decided that it would be inequitable to enter a decree except in such form as to bind the Commission and the United States, and as the United States had not consented to a suit in this Court upon an original bill, the bill would have to be dismissed. To the same effect are *Texas* v. *Interstate Com. Comm.*, 258 U. S. 158, 164; *Lambert Co.* v. *Baltimore & Ohio R. R.*, 258 U. S. 377, 382.

The complainant cites four cases to support its contention that this is not a suit against the United

States: *Ohio* v. *Helvering*, 292 U. S. 360; *Hill* v. *Wallace*, 259 U. S. 44; *Philadelphia Company* v. *Stimson*, 223 U. S. 605; *Pennoyer* v. *McConnaughy*, 140 U. S. 1.

Ohio v. *Helvering* clearly is not relevant since the Court denied leave to file an original bill on other grounds and therefore apparently considered it unnecessary to pass upon this question.*

Hill v. *Wallace* likewise gives no support to complainant's position. Although this Court there sanctioned an injunction against the Collector of Internal Revenue and the United States Attorney, the question whether the suit was in fact one against the United States was neither argued by the parties nor considered by the court.

In *Philadelphia Co.* v. *Stimson*, the charge was that the Secretary of War and other officers of the War Department were in effect committing a trespass upon plaintiff's property, and were threatening to prosecute criminal actions, in connection with the fixing of a harbor line. The Court held that it had jurisdiction to determine whether the action of the Secretary of War was legal. The same result was reached under similar circumstances in *Goltra* v. *Weeks*, 271 U. S. 536, where the plaintiff sought to enjoin the seizure of a fleet

* The Court by citing (p. 368) *Ex parte Bakelite Corp.*, 279 U. S. 438, 448, and *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553, plainly indicated that its decision was not to be taken as a holding on the propriety of the suit.

of towboats by the Secretary of War and Army Officers who were charged with a conspiracy to deprive him of the boats which he alleged belonged to him. In the *Goltra* case, however, the Court pointed out the distinction between the *Stimson* case and cases like *Wells* v. *Roper, supra,* in which the First Assistant Postmaster General had annulled a contract between the plaintiff and the United States by which the plaintiff was to use his cars to carry the mail. The Court pointed out that in the *Stimson* case the defendants threatened "a trespass upon the property of the plaintiff," whereas in *Wells* v. *Roper* "the automobiles of the plaintiff were not to be taken away from him by the government officers." See also *Louisiana* v. *McAdoo, supra.* In the present case, since no trespass or seizure of complainant's property is threatened, the *Stimson* case and *Goltra* v. *Weeks,* do not apply. Moreover, it is clear that an allegation that the statute under which the defendant officers are acting is unconstitutional is not enough to sustain jurisdiction, if the suits are in fact against the sovereign. *Hagood* v. *Southern,* 117 U. S. 52; *In re Ayers,* 123 U. S. 443.

Pennoyer v. *McConnaughy,* also relied upon by complainant, is similar to the *Stimson* case in that the threatened action of the defendant, the conveyance to another of lands to which the plaintiff had title, constituted in and of itself the creation of a cloud upon the plaintiff's title. Such action

is tortious in nature and necessarily subjects the defendant to liability or injunctive restraint unless he can show authority of law for his action.

Action of the character enjoined in the *Stimson* and *McConnaughy* cases is entirely different from that complained of here. The decisions of the Railroad Retirement Board and the Commissioner of Internal Revenue that the Railroad Retirement and Carriers Taxing Acts are applicable to complainant, even if incorrect, cannot be regarded as tortious. If, pursuant to these decisions, the Board makes orders requiring records and information, or the Collector of Internal Revenue attempts without distraint to collect taxes, their action, taken in the discharge of official duties, can impinge upon complainant only through the intervention of normal judicial processes and subject to full judicial review.

It is further submitted that the United States has a peculiarly direct interest in an action by which the collection of its taxes is sought to be enjoined. Taxes are "the sole means by which sovereignties can maintain their existence." *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146. See *Bull* v. *United States*, 295 U. S. 247, 259. The case is quite different from a suit to enjoin the enforcement of excessive or discriminatory rates by public service corporations (*Prendergast* v. *New York Telephone Co.*, 262 U. S. 43; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290) for the State has no pecu-

niary interest in such an action. When the taxes are collected the title to them vests in the United States, which is consequently vitally interested in enforcing their payment. *Cf. Goldberg* v. *Daniels*, 231 U. S. 218; *Minnesota* v. *Hitchcock*, 185 U. S. 373. The officials who are made the nominal defendants have no pecuniary interest in the tax. The question whether the United States is the real party in interest must be determined by the effect of the judgment or decree which can be entered (*Minnesota* v. *Hitchcock*; *Oregon* v. *Hitchcock*, *supra*). The primary effect of a decree for the complainant here will be to deprive the United States of revenue. Hence, we submit, the United States is the real party in interest. Its presence is indispensable but it cannot be joined. Hence leave to file the bill should be denied.

VI

THE ISSUES PRESENTED BY COMPLAINANT HAVE CLEARLY BEEN DECIDED AGAINST IT BY PREVIOUS DECISIONS OF THIS COURT

We are confident that, for the reasons already advanced, the complainant is not entitled to proceed in this Court. However, there is a further and alternative reason why leave to file the proposed bill should be denied. Complainant's case is without merit because previous decisions of this Court have completely disposed of all substantive questions which it presents. Compare *Ohio* v. *Helvering*, 292 U. S. 360.

1. The application of the Railroad Retirement Acts and the Carriers Taxing Act of 1937 to the State Belt Railroad presents no new question of statutory construction. These Acts are expressly made applicable to any "carrier by railroad, subject to Part I of the Interstate Commerce Act." Railroad Retirement Act of 1937, Sections 1 (a), 1 (m); Railroad Retirement Act of 1935, Section 1 (a); Carriers Taxing Act, Sections 1 (a), 1 (i). In *United States* v. *California*, 297 U. S. 175, 186, this Court recognized that the State Belt Railroad is a carrier by railroad subject to Part I of the Interstate Commerce Act, citing *California Canneries Co.* v. *Southern Pacific Co.*, 51 I. C. C. 500, which so decided. This Court has, therefore, passed upon the status of the specific instrumentality here involved and in so doing has decided the sole question of statutory construction which the complainant now presents.

2. It is not entirely clear whether, in addition to the question of statutory construction, the proposed bill charges that the Acts in question are unconstitutional if they are applicable to the State Belt Railroad. Complainant's brief in support of its motion for leave to file the bill asserts (p. 6) that these Acts are unconstitutional as applied to it, presumably on the ground that they invade its sovereign immunity from Federal taxation or interference. If the bill may be said properly to raise this constitutional question (see pp. 20 and 30),

it is one which has likewise conclusively been disposed of by previous decisions of this Court.

a. In *United States* v. *California, supra,* this Court held the operation of the State Belt Railroad to be subject to Federal regulation under the commerce power, and to the penalty imposed by Federal law for failure to comply with such regulation. If, as complainant alleges, "The Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937, and the Carriers Taxing Act of 1937, on account of their interrelationship and substantial singleness of purpose constitute one legislative enactment having for its sole purpose the establishment and operation of a pension system and the provision of funds to supply annuities and disability and death benefits to the members of such system," then, notwithstanding the fact that the complaint is in part directed against an exercise of the taxing power, the proper criterion of state immunity is its immunity as against the regulatory powers of Congress rather than its immunity to ordinary taxation. *Board of Trustees* v. *United States,* 289 U. S. 48.

b. Insofar as the bill raises any question of an immunity of the State Belt Railroad from the Federal taxing power as such, it seems plain enough that the Railroad's activities do not constitute an essential governmental function of the State. We see no reason to distinguish the operations of a belt line railroad from those of the elevated railway

considered in *Helvering* v. *Powers*, 293 U. S. 214. In each case, "the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the Federal taxing power and is distinct from the usual governmental functions that are immune from Federal taxation in order to safeguard the necessary independence of the State" (p. 227). See also *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, *supra*; *Helvering* v. *Therrell*, No. 128, this Term.

c. The activities of the State Belt Railroad are subject to the full scope of the commerce power of Congress. *United States* v. *California*, *supra*. It was argued in *Helvering* v. *Gerhardt*, Nos. 779–781, now pending before this Court, that, since the State has no independence of the Federal government when it engages in interstate commerce, there is no reason to extend it immunity from the Federal taxing power. See *Helvering* v. *Powers*, *supra*, 225; *Willcuts* v. *Bunn*, 282 U. S. 216, 225. If the Court should approve this branch of the Government's argument in the *Gerhardt* case, there would, of course, be no basis for a claim of tax immunity on the part of the State Belt Road.

Accordingly, it seems that in this case, as fully as in *Ohio* v. *Helvering*, *supra*, leave to file the bill of complaint might well be denied because the questions sought to be raised by the bill have so clearly been decided against the complainant by the prior

decisions of this Court. See, also, *Florida* v. *Mellon*, 273 U. S. 12, 17.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file the bill of complaint should be denied and the rule to show cause discharged.

However, should the Court determine to grant the motion, we respectfully request leave to answer the bill of complaint for the purpose of denying certain of the allegations contained therein.

ROBERT H. JACKSON,
Solicitor General.
THURMAN W. ARNOLD,
JAMES W. MORRIS,
Assistant Attorneys General.
SEWALL KEY,
JOHN J. ABT,
ARNOLD RAUM,
Special Assistants to the Attorney General.
WARNER W. GARDNER,
Special Attorney.

LESTER P. SCHOENE,
General Counsel,
MILTON KRAMER,
Attorney,
Railroad Retirement Board.

APPENDIX

Article III, Section 2, Clauses 1 and 2 of the Constitution:

> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different States; between citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.

U. S. GOVERNMENT PRINTING OFFICE: 1939

BLANK

PAGE

[PUBLIC—No. 399—74TH CONGRESS]

[H. R. 8651]

AN ACT

To establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

DEFINITIONS

SECTION 1. For the purposes of this Act—

(a) The term "carrier" means any express company, sleeping-car company, or carrier by railroad, subject to the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means any person (1) who shall be at the enactment hereof or shall have been at any time after the enactment hereof in the service of a carrier, or who shall be at the enactment hereof or shall have been at any time after the enactment hereof in the employment relation to a carrier, and (2) each officer or other official representative of an "employee organization", herein called "representative" who before or after the enactment hereof has performed service for a carrier, who at the enactment hereof or at any time after the enactment is or shall be duly designated and authorized to represent employees in accordance with the Railway Labor Act, and who, during, or immediately following employment by a carrier, is, shall be, or shall have been engaged in such representative service in behalf of such employees.

(c) A person shall be deemed to be in the service of a carrier whenever he may be subject to its continuing authority to supervise and direct the manner of rendition of his service, for which service he receives compensation.

(d) A person is in the employment relation to a carrier when furloughed or on leave of absence, and subject to call for service and ready and willing to serve, all in accordance with the established rules and practices usually in effect on railroads.

(e) The term "service period" means the total service of a person for one or more carriers whether or not continuously performed either before or after the effective date, and includes as one month every calendar month during which such person has rendered service to a carrier for compensation and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(f) The term "annuity" means a fixed sum payable at the beginning of each month during retirement, ceasing at death except as otherwise provided in section 5 hereof or at resumption of service for which an employee receives compensation.

(g) The term "compensation" means any form of money remuneration for service, received by an employee from a carrier, including salaries and commissions, but shall not include free transportation nor any payment received on account of sickness, disability, pensions, or other form of relief.

(h) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(i) The term "age" means age at the latest attained birthday.

(j) The term "Board" means the Railroad Retirement Board.

(k) The term "effective date" means the 1st day of March 1936.

(l) The term "enactment" means the date on which this Act shall become a law.

RETIREMENT

SEC. 2. Upon the attainment of sixty-five years of age and continuance in service by the employee (but not before the effective date of this Act), the annuity of such employee shall be reduced one-fifteenth for every year of such continued service beyond the age of sixty-five years; except that such reduction shall not apply during any period, beginning at the age of sixty-five and not extending beyond the age of seventy, while the employee is continued in employment under an agreement in writing between the carrier and employee filed with the Board, which agreement may provide for extension of employment for one year and thereafter in like manner for successive periods of one year each. Such reduction of annuity shall not apply to an employee who occupies an official position in the service of a carrier or to employees' representatives.

ANNUITIES

SEC. 3. The following-described employees, after retirement whether or not then in the service of a carrier, shall be paid annuities:

(a) A person (without regard to the period of service and whether rendered before or after the enactment hereof), who either at the enactment hereof or thereafter shall be sixty-five years of age or over.

(b) A person who either at the enactment hereof or who thereafter shall be fifty years of age or over and who shall have completed a

service period of thirty years. An annuity paid under this subdivision shall be reduced by one-fifteenth of such annuity for each year such employee may be less than sixty-five years of age at the time of the first annuity payment.

(c) A person who either before or after the enactment shall have completed a service period of thirty years and who shall be after the enactment hereof retired by the carrier on account of mental or physical disability. An annuity paid under this subdivision shall not be subject to the deduction specified in subdivision (b) of this section.

The annuities hereinbefore mentioned shall be paid out of any money in the Treasury which may be appropriated for that purpose. An annuity shall begin as of a date to be specified in a written application to be signed by the employee entitled thereto, and approved by the Board, which date shall not be more than sixty days before the filing of the application, nor before the date on which the first annuity shall have become due and payable. An annuity shall not be due and payable until ninety days after the effective date hereof. The annuity shall be payable on the 1st day of the month during the lifetime of the annuitant. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the total number of years of service not exceeding thirty years by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the compensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee shall have received compensation from any carrier out of eight consecutive calendar years of such services ended December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity. Any employee who shall be entitled to an annuity with a commuted value determined by the Board of less than $300 shall be paid such value in a lump sum.

ANNUITIES TO REPRESENTATIVES

SEC. 4. The annuity of a representative shall be determined according to such rules and regulations as the Board shall deem just and reasonable and, as near as may be, shall be the same annuity as if the representative were still in the employ of his last former carrier.

PAYMENTS UPON DEATH

SEC. 5. If a person receiving or entitled to receive an annuity shall die, the Board, for one year after the first day of the month in which the death may have occurred, shall pay, as herein provided, an annuity equal to one-half of the annuity which such person so dying may have received or may have been entitled to receive, to the widow or widower of the deceased, or if there be no widow or widower, to the dependent next of kin of the deceased. Any employee may elect, on making application for an annuity, to have

the present value of the annuity apply to the payment of a reduced annuity to the employee during life and an annuity during the life of a surviving spouse. The present values and amounts of the annuity payments shall be determined on the basis of the combined annuity tables with interest at 3 per centum per annum.

Retirement Board

personnel

Sec. 6. (a) There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act.

Duties

(b) The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall take such steps as may be necessary to enforce this Act and make and certify awards and payments.

The Board shall from time to time certify to the Secretary of the Treasury the name and address of each person entitled to receive a payment under this Act, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursement of the Treasury Department, and prior to audit or settlement by the General Accounting Office, shall make payment in accordance with the certification by the Board.

The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board which shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the payments to be required to provide for all annuities, other disbursements, and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employee and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

SPECIAL REPORT

SEC. 7. Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations. The Board shall in a like special report to be made at the earliest practicable time, make specific recommendations with regard to the desirability and practicability of substituting the provisions for annuities and other benefits to employees under this Act for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and transfer such obligations to the retirement system herein established.

It is recognized that existing individual carrier pension plans are wholly at the option of the carriers unless in any case express provision is made otherwise, and no restriction is imposed under this Act upon such plans; nor is it expected that carriers will modify existing pension plans on account of this Act beyond a reduction of current pension payments under such existing plans in amounts equal to the annuity payments currently received by the employee under this Act.

INVESTIGATION COMMISSION

SEC. 8. (a) That a commission be appointed which shall be composed of three Members of the Senate designated by the President of the Senate; three Members of the House of Representatives designated by the Speaker of the House of Representatives; and three members who shall be designated by the President of the United States. The President shall designate one member to be chairman and another to be vice chairman of the Commission. The Commission is hereby authorized and directed to make, and report through the President to the Congress of the United States not later than January 1, 1936, the results of, a thorough investigation of all pertinent facts relating to a retirement annuity system applicable by law to carriers by railroad engaged in interstate commerce and particularly any and all questions for the investigation of which provision is made under the preceding section. The Commission is also authorized to hold hearings respecting desirable provisions of a sound retirement and annuity system. In the making of such investigation the Commission may consider the experience of other industries and of governments, as well as of the railroad industry, and may avail itself of the assistance of all agencies of the Federal Government. Until January 1, 1936, the duties and authority of the Board under the preceding section are limited to cooperation with and action under the direction of the Commission. With its report setting forth the results of its investigation, the Commission shall include such recommendations for legislation, if any, as it may deem necessary to give effect to its conclusions.

(b) The Commission, in the performance of its duties, is authorized to sit and act at such times and places either in the District of Columbia or elsewhere during the sessions, recesses, and adjourned periods of the Seventy-fourth Congress, to require by subpena or otherwise the attendance of such witnesses and the production and impounding of such books, papers, records, files, and documents, to have access to such books, papers, records, files, and documents of any corporation or person, to administer such oaths and to take such testimony and to make such expenditures, as it may deem advisable. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction upon application by the Commission through its attorneys to compel obedience to any order or subpena of the Commission issued pursuant to this section. The orders, writs, and processes of the Supreme Court of the District of Columbia in such matters may run and be served anywhere in the United States.

(c) The Commission shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and to employ, without regard to the provisions of the Civil Service Act such experts and clerical, stenographic, legal, and other assistance as may be necessary for the proper discharge of its duties, and without respect to the provisions of the Classification Act of 1923, as amended, fix the compensation of any person employed. The President shall fix the compensation to be paid the three members of the Commission to be appointed by the President. All expenses of the Commission for all time in which the Commission shall be actually engaged in this investigation shall be paid out of any funds

in the Treasury of the United States, not otherwise appropriated, on a certificate of the chairman of the Commission, and the sum necessary for carrying out the provisions of this resolution is hereby authorized to be appropriated: *Provided*, That the total expense authorized for the purposes of the Commission shall not exceed the sum of $60,000 which shall include the compensation herein authorized.

COURT JURISDICTION

SEC. 9. The several District Courts of the United States and the Supreme Court of the District of Columbia, respectively, shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by an employee or other person aggrieved in or to the district court of any district wherein the Board may have established an office, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take action, or to make a decision necessary for the enforcement of a legal right of the applicant.

(b) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

(c) The Railroad Retirement Board, as hereinbefore established, shall be and constitute a body corporate and be capable of suing and being sued as such.

EXEMPTION

SEC. 10. No annuity payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

PENALTIES

SEC. 11. Any officer or agent of a carrier, as the word "carrier" is hereinbefore defined, or any employee as such word is hereinbefore defined, or any person whether or not of the character hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act, or who shall knowingly make any false or fraudulent statement or report in response to any report or statement required to be made for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act, shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 12. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATION AUTHORIZED

SEC. 13. The appropriation of such money from time to time out of the Treasury of the United States as may be necessary to carry this Act into effect, is hereby authorized.

SHORT TITLE

SEC. 14. This Act may be cited as the "Railroad Retirement Act of 1935".

SEC. 15. The term "employment", as defined in subsection (b) of section 210 of Title II of the Social Security Act, shall not include service performed in the employ of a carrier as defined in subdivision (a) of section 1 of the Railroad Retirement Act of 1935.

Approved, August 29, 1935.

[PUBLIC—No. 162—75TH CONGRESS]

[CHAPTER 382—1ST SESSION]

[H. R. 7519]

AN ACT

To amend an Act entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", approved August 29, 1935.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PART I

That the Act of August 29, 1935, entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", be, and it is hereby, amended to read as follows:

"DEFINITIONS

"SECTION 1. For the purposes of this Act—

"(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term 'employer' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'employer' shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of

the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

"(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date. The term 'employee representative' means any officer or official representative of a railway labor organization other than a labor organization included in the term 'employer' as defined in section 1 (a) who before or after the enactment date was in the service of an employer as defined in section 1 (a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, as amended, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

"(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: *Provided, however*, That an individual shall be deemed to be in the service of an employer not conducting the principal part of its business in the United States only when he is rendering service to it in the United States.

"(d) An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the employer: *Provided, however*, That an individual shall not be deemed to have been on the enactment date in the employment relation to an employer not conducting the principal part of its business in the United States unless during the last pay-roll period in which he rendered service to it prior to the enactment date, he rendered service to it in the United States.

"(e) The term 'United States', when used in a geographical sense, means the States, Alaska, Hawaii, and the District of Columbia.

"(f) The term 'years of service' shall mean the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost, and shall be computed in accordance with the provisions of section 3 (b): *Provided, however*, That where service prior to the enactment date may be included in the computation of years of service as provided in subdivision (1) of section 3 (b), it may be included as to service rendered to a person which was on the enactment date an employer, irrespective of whether, at the time such service was rendered, such person was an employer; and it may also be included as to service rendered to any express company, sleeping-car company, or carrier by railroad which was a predecessor of a company which, on

the enactment date, was a carrier as defined in subsection (m), irrespective of whether, at the time such service was rendered to such predecessor, it was an employer. Twelve calendar months, consecutive or otherwise, in each of which an employee has rendered such service or received such wages for time lost, shall constitute a year of service. An ultimate fraction of six months or more shall be taken as one year. An ultimate fraction of less than six months shall be taken at its actual value.

"(g) The term 'annuity' means a monthly sum which is payable on the 1st day of each calendar month for the accrual during the preceding calendar month.

"(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. Such term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of any tax now or hereafter imposed with respect to the compensation of such employee.

"(i) The term 'Board' means the Railroad Retirement Board.

"(j) The term 'enactment date' means the 29th day of August 1935.

"(k) The term 'company' includes corporations, associations, and joint-stock companies.

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

"(n) The term 'person' means an individual, a partnership, an association, a joint-stock company, or a corporation.

"ANNUITIES

"SEC. 2. (a) The following-described individuals, if they shall have been employees on or after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 1 (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):

"1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

"2. Individuals who on or after the enactment date shall be sixty years of age or over and (a) either have completed thirty years of service or (b) have become totally and permanently disabled for regular employment for hire, but the annuity of such individuals shall be reduced one one-hundred-and-eightieth for each calendar month that they are under age sixty-five when the annuity begins to accrue.

"3. Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service.

"Such satisfactory proof of the permanent total disability and of the continuance of such disability until age sixty-five shall be

made from time to time as may be prescribed by the Board. If the individual fails to comply with the requirements prescribed by the Board as to proof of the disability or the continuance of the disability until age sixty-five, his right to an annuity under subdivision 2 or subdivision 3 of this subsection by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights under subdivision 1 or 2 (a) of this subsection. If, prior to attaining age sixty-five, such an individual recovers and is no longer disabled for regular employment for hire, his annuity shall cease upon the last day of the month in which he so recovers and if after such recovery the individual is granted an annuity under subdivision 1 or 2 (a) of this subsection, the amount of such annuity shall be reduced on an actuarial basis to be determined by the Board so as to compensate for the annuity previously received under this subdivision.

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2 (b) and subdivision 3 of subsection (a) prior to attaining age sixty-five.

"(c) An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the individual entitled thereto), but—

"(1) not before the date following the last day of compensated service of the applicant, and

"(2) not more than sixty days before the filing of the application.

"(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service.

"COMPUTATION OF ANNUITIES

"SEC. 3. (a) The annuity shall be computed by multiplying an individual's 'years of service' by the following percentages of his 'monthly compensation': 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the next $150.

"(b) The 'years of service' of an individual shall be determined as follows:

"(1) In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936, and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty: *Provided, however*, That with respect to any such individual who rendered service to any employer after January 1, 1937, and who on the enactment date was not an employee of an employer conducting the principal part of its business in the United States no greater proportion of his service

rendered prior to January 1, 1937, shall be included in his 'years of service' than the proportion which his total compensation (including compensation in any month in excess of $300) for service after January 1, 1937, rendered anywhere to an employer conducting the principal part of its business in the United States or rendered in the United States to any other employer bears to his total compensation (including compensation in any month in excess of $300) for service rendered anywhere to an employer after January 1, 1937.

"(2) In all other cases, the years of service shall include only the service subsequent to December 31, 1936.

"(3) Where the years of service include only part of the service prior to January 1, 1937, the part included shall be taken in reverse order beginning with the last calendar month of such service.

"(4) In no case shall the years of service include any service rendered after June 30, 1937, by an individual who is sixty-five years of age or over, except for the purpose of computing his monthly compensation as provided in subsection (c) of this section.

"(c) The 'monthly compensation' shall be the average compensation earned by an employee in calendar months included in his 'years of service', except (1) that with respect to service prior to January 1, 1937, the monthly compensation shall be the average compensation earned by an employee in calendar months included in his years of service in the years 1924–1931, and (2) that where service in the period 1924–1931 is, in the judgment of the Board, insufficient to constitute a fair and equitable basis for determining the monthly compensation for service prior to January 1, 1937, the Board shall determine the monthly compensation for such service in such manner as in its judgment shall be just and equitable. If the employee earned compensation after June 30, 1937, and after the last day of the month in which he attained age sixty-five, such compensation shall be disregarded if the result of taking such compensation into account would be to diminish his annuity. In computing the monthly compensation, no part of any month's compensation in excess of $300 shall be recognized.

"(d) The annuity of an individual who shall have been an employee representative shall be determined in the same manner and with the same effect as if the employee organization by which he shall have been employed were an employer.

"(e) If the individual was an employee when he attained age sixty-five and has completed twenty years of service, the minimum annuity payable to him shall be $40 per month: *Provided, however*, That if the monthly compensation on which his annuity is based is less than $50, his annuity shall be 80 per centum of such monthly compensation, except that if such 80 per centum is less than $20, the annuity shall be $20 or the same amount as the monthly compensation, whichever is less. In no case shall the value of the annuity be less than the value of the additional old-age benefit he would receive under title II of the Social Security Act if his service as an employee after December 31, 1936, were included in the term 'employment' as defined therein.

"(f) Annuity payments due an individual but not yet paid at death shall be paid to a surviving spouse if such spouse is entitled

to an annuity under an election made pursuant to the provisions of section 4; otherwise they shall be paid to the same individual or individuals who may be entitled to receive any death benefit that may be payable under the provisions of section 5.

"(g) No annuity shall accrue with respect to the calendar month in which an annuitant dies.

"(h) After an annuity has begun to accrue, it shall not be subject to recomputation on account of service rendered thereafter to an employer, except as provided in subdivision 3 of section 2 (a).

"(i) If an annuity is less than $2.50, it may, in the discretion of the Board, be paid quarterly or in a lump sum equal to its commuted value as determined by the Board.

"JOINT AND SURVIVOR ANNUITY

"SEC. 4. An individual whose annuity shall not have begun to accrue may elect prior to January 1, 1938, or at least five years before the date on which his annuity begins to accrue, or upon furnishing proof of health satisfactory to the Board, to have the value of his annuity apply to the payment of a reduced annuity to him during life and an annuity after his death to his spouse during life equal to, or 75 per centum of, or 50 per centum of such reduced annuity. The amounts of the two annuities shall be such that their combined actuarial value as determined by the Board shall be the same as the actuarial value of the single-life annuity to which the individual would otherwise be entitled. Such election shall be irrevocable, except that it shall become inoperative if the individual or the spouse dies before the annuity begins to accrue or if the individual's marriage is dissolved or if the individual shall be granted an annuity under subdivision 3 of section 2 (a); *Provided, however*, That the individual may, if his marriage is dissolved before the date his annuity begins to accrue, or if his annuity under subdivision 3 of section 2 (a) ceases because of failure to make the required proof of disability, make a new election under the conditions stated in the first sentence of this subsection. The annuity of a spouse under this subsection shall begin to accrue on the first day of the calendar month in which the death of the individual occurs.

"DEATH BENEFITS

"SEC. 5. The following benefits shall be paid with respect to the death of individuals who were employees after December 31, 1936:

"(a) If the deceased should not be survived by a widow or widower who is entitled to an annuity under an election made pursuant to the provisions of section 4, there shall be paid to such person or persons as the deceased may have designated by a writing filed with the Board prior to his death, or if there be no designation, to the legal representative of the deceased, the amount, if any, by which 4 per centum of the aggregate compensation earned by the deceased after December 31, 1936, exceeds the sum of the total of the annuity payments actually made to the deceased plus the total of the annuity payments due the deceased but not yet paid at death. If the person or persons designated to receive the death benefit do not survive the deceased, the death benefit shall be paid to the legal representative of the deceased.

"(b) If the deceased should be survived by a widow or widower entitled to an annuity under an election made pursuant to the provisions of section 4, there shall, on the death of the widow or widower, be paid to such person or persons as the deceased may have designated by a writing filed with the Board prior to his death, or if there be no designation, to the legal representative of the deceased, the amount, if any, by which 4 per centum of the aggregate compensation earned by the deceased after December 31, 1936, exceeds the sum of the total of the annuity payments actually made to the deceased plus the total of the annuity payments actually made to the widow or widower under an election made pursuant to the provisions of section 4 and under the provisions of section 3 (f), plus the total of the annuity payments due the widow or widower but not yet paid at death. If the person or persons designated to receive the death benefit do not survive the widow or widower, the death benefit shall be paid to the legal representative of the deceased.

"In computing the aggregate compensation for the purpose of this section, no part of any month's earnings in excess of $300 shall be recognized.

"PENSIONS TO INDIVIDUALS ON PENSION OR GRATUITY ROLLS OF EMPLOYERS

"SEC. 6. (a) Beginning July 1, 1937, each individual then on the pension or gratuity roll of an employer by reason of his employment, who was on such roll on March 1, 1937, shall be paid on July 1, 1937, and on the 1st day of each calendar month thereafter during his life, a pension at the same rate as the pension or gratuity granted to him by the employer without diminution by reason of a general reduction or readjustment made subsequent to December 31, 1930, and applicable to pensioners of the employer: *Provided, however*, That no pension payable under this section shall exceed $120 monthly: *And provided further*, That no individual on the pension or gratuity roll of an employer not conducting the principal part of its business in the United States shall be paid a pension under this section unless, in the judgment of the Board, he was, on March 1, 1937, carried on the pension or gratuity roll as a United States pensioner.

"(b) No individual covered by this section who was on July 1, 1937, eligible for an annuity under this Act or the Railroad Retirement Act of 1935, based in whole or in part on service rendered prior to January 1, 1937, shall receive a pension payment under this section subsequent to the payment due on October 1, 1937, or due on the 1st day of the month in which the application for an annuity of such individual has been awarded and certified by the Board, whichever of the two dates is earlier. The annuity claims of such individuals who receive pension payments under this section shall be adjudicated in the same manner and with the same effect as if no pension payments had been made: *Provided, however*, That no such individual shall be entitled to receive both a pension under this section and an annuity under this Act or the Railroad Retirement Act of 1935, and in the event pension payments have been made to any such individual in any month in which such individual is entitled to an annuity under this Act or the Railroad Retirement Act of 1935, the difference between the amounts paid as pensions and the amounts due as annuities shall be adjusted in accordance with such rules and regulations as the Board may deem just and reasonable.

"(c) The pension paid under this section shall not be considered to be in substitution for that part of the pension or gratuity from the employer which is in excess of a pension or gratuity at the rate of $120 a month.

"SEC. 7. Nothing in this Act or the Railroad Retirement Act of 1935 shall be taken as restricting or discouraging payment by employers to retired employees of pensions or gratuities in addition to the annuities or pensions paid to such employees under such Acts, nor shall such Acts be taken as terminating any trust heretofore created for the payment of such pensions or gratuities.

"CONCLUSIVENESS OF RETURNS OF COMPENSATION AND OF FAILURE TO MAKE RETURNS OF COMPENSATION

"SEC. 8. Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of monthly compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their monthly compensation as reported to the Board. Any such return shall be conclusive as to the amount of compensation earned by an employee during each month covered by the return, and the fact that no return was made of the compensation claimed to be earned by an employee during a particular calendar month shall be taken as conclusive that no compensation was earned by such employee during that month, unless the error in the amount of compensation returned in the one case, or the failure to make return of the compensation in the other case, is called to the attention of the Board within four years after the last date on which return of the compensation was required to be made.

"ERRONEOUS PAYMENTS

"SEC. 9. (a) If the Board finds that at any time more or less than the correct amount of any annuity or pension has theretofore been paid to any individual under this Act or the Railroad Retirement Act of 1935, then, under regulations made by the Board, proper adjustments shall be made in connection with subsequent payments under such Acts to the same individual.

"(b) There shall be no recovery of payments of annuities, death benefits, or pensions from any person who, in the judgment of the Board, is without fault and if, in the judgment of the Board, such recovery would be against equity and good conscience. No disbursing officer shall be held liable for any amount paid by him to any person where the recovery of such amount is waived under this section.

"RETIREMENT BOARD

"Personnel

"SEC. 10. (a) There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of the term and the terms of office of the members first

taking office after the enactment date shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years after the enactment date. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially for a term of two years without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees. Vacancies in the Board shall not impair the powers or affect the duties of the Board or of the remaining members of the Board, of whom a majority of those in office shall constitute a quorum, for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on official duties.

"Duties

"(b) 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

"2. If the Board finds that an applicant is entitled to an annuity under the provisions of this Act or the Railroad Retirement Act of 1935 then the Board shall make an award fixing the amount of the annuity and shall certify the payment thereof as hereinafter provided; otherwise the application shall be denied.

"3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursements of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board.

"4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, with power as a Board or through any member or designated subordinate thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions. In the employment of such individuals under the civil service laws and rules the Board shall give preference over all others to individuals who have had experience in railroad service, if, in the judgment of the Board,

they possess the qualifications necessary for the proper discharge of the duties of the positions to which they are to be appointed. All rules, regulations, or decisions of the Board shall require the approval of at least two members except as provided in subdivision 5 of this subsection and they shall be entered upon the records of the Board, which shall be a public record. Notice of a decision of the Board, or of an employee thereof, shall be communicated to the applicant in writing within thirty days after such decision shall have been made. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary to assure proper administration of such Acts. The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section. The orders, writs, and processes of the District Court of the United States for the District of Columbia in such suits may run and be served anywhere in the United States. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

"5. The Board is authorized to delegate to any of its employees the power to make decisions on applications for annuities or death benefits in accordance with rules and regulations prescribed by the Board: *Provided, however*, That any person aggrieved by a decision so made shall have the right to appeal to the Board.

"COURT JURISDICTION

"SEC. 11. An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate relief. The decision of the Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit. The jurisdiction herein specifically conferred upon the Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act or the Railroad Retirement Act of 1935.

"EXEMPTION

"SEC. 12. No annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

"PENALTIES

"SEC. 13. Any officer or agent of an employer, as the word 'employer' is hereinbefore defined, or any employee acting in his own behalf, or any individual whether or not of the character hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (b) 4, by the Board in the administration of this Act or the Railroad Retirement Act of 1935, or who shall knowingly make or cause to be made any false or fraudulent statement or report when a statement or report is required to be made for the purpose of such Acts, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of causing an award or payment under such Acts, shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year.

"SEPARABILITY

"SEC. 14. If any provision of this Act or the Railroad Retirement Act of 1935, or the application thereof to any person or circumstance, should be held invalid, the remainder of such Act, or the application of such provision to other persons or circumstances, shall not be affected thereby.

"RAILROAD RETIREMENT ACCOUNT

"SEC. 15. (a) There is hereby created an account in the Treasury of the United States to be known as the Railroad Retirement Account. There is hereby authorized to be appropriated to the account for each fiscal year, beginning with the fiscal year ending June 30, 1937, as an annual premium an amount sufficient, with a reasonable margin for contingencies, to provide for the payment of all annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935. Such amount shall be based on such tables of mortality as the Railroad Retirement Board shall from time to time adopt, and on an interest rate of 3 per centum per annum compounded annually. The Railroad Retirement Board shall submit annually to the Bureau of the Budget an estimate of the appropriation to be made to the account.

"(b) At the request and direction of the Board, it shall be the duty of the Secretary of the Treasury to invest such portion of the amounts credited to the account as, in the judgment of the Board, is not immediately required for the payment of annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935 in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired on original issue at par or by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the account. Such special obligations shall bear interest at the rate of 3 per centum per annum. Obligations other than such special obligations

may be acquired for the account only on such terms as to provide an investment yield of not less than 3 per centum per annum. It shall be the duty of the Secretary of the Treasury to sell and dispose of obligations in the account if it shall be in the interest of the account so to do. Any obligations acquired by the account, except special obligations issued exclusively to the account, may be sold at the market price. Special obligations issued exclusively to the account shall, at the request of the Board, be redeemed at par plus accrued interest. All amounts credited to the account shall be available for the payment of all annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935.

"(c) The Board is hereby authorized and directed to select two actuaries, one from recommendations made by representatives of employees and the other from recommendations made by representatives of carriers. These actuaries, along with a third who shall be designated by the Secretary of the Treasury, shall be known as the Actuarial Advisory Committee with respect to the Railroad Retirement Account. The committee shall examine the actuarial reports and estimates made by the Railroad Retirement Board and shall have authority to recommend to the Board such changes in actuarial methods as they may deem necessary. The compensation of the members of the committee of actuaries, exclusive of the member designated by the Secretary, shall be fixed by the Board on a per-diem basis.

"(d) The Board shall include in its annual report a statement of the status and the operations of the Railroad Retirement Account. At intervals not longer than three years the Board shall make an estimate of the liabilities created by this Act and the Railroad Retirement Act of 1935 and shall include such estimate in its annual report. Such report shall also contain an estimate of the reduction in liabilities under Title II of the Social Security Act arising as a result of the maintenance of this Act and the Railroad Retirement Act of 1935.

"APPROPRIATION FOR ADMINISTRATIVE EXPENSES

"SEC. 16. There is hereby authorized to be appropriated from time to time such sums as may be necessary to provide for the expenses of the Board in administering the provisions of this Act and the Railroad Retirement Act of 1935.

"SOCIAL SECURITY ACT

"SEC. 17. The term 'employment', as defined in subsection (b) of section 210 of title II of the Social Security Act, shall not include service performed by an individual as an employee as defined in section 1 (b).

"FREE TRANSPORTATION

"SEC. 18. It shall not be unlawful for carriers by railroad subject to this Act to furnish free transportation to individuals receiving annuities or pensions under this Act or the Railroad Retirement Act of 1935 in the same manner as such transportation is furnished to employees in their service."

PART II

SEC. 201. The Act entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", approved August 29, 1935, as in force prior to its amendment by part I of this Act, may be cited as the "Railroad Retirement Act of 1935"; and such Act, as amended by part I of this Act, may be cited as the "Railroad Retirement Act of 1937".

SEC. 202. The claims of individuals (and the claims of spouses and next of kin of such individuals) who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be employee representatives as defined therein, and became eligible for annuities under such Act, shall be adjudicated by the Board in the same manner and with the same effect as if this Act had not been enacted: *Provided, however*, That with respect to any such claims no reduction shall be made in any annuity certified after the date of the enactment of this Act because of continuance in service after age sixty-five: *And provided further*, That service rendered prior to August 29, 1935, to a company which on that date was a carrier as defined in the Railroad Retirement Act of 1935, shall be included in the service period in connection with any annuity certified in whole or in part by the Board after the date of the enactment of this Act, irrespective of whether at the time such service was rendered such company was a carrier as defined in the Railroad Retirement Act of 1935; and service rendered prior to August 29, 1935, to any express company, sleeping-car company, or carrier by railroad which was a predecessor of a company which on that date was a carrier as defined in the Railroad Retirement Act of 1935, shall also be included in the service period in connection with any annuity certified in whole or in part by the Board after the date of the enactment of this Act, irrespective of whether at the time such service was rendered such predecessor was a carrier as defined in the Railroad Retirement Act of 1935: *And provided further*, That annuity payments due an individual under the Railroad Retirement Act of 1935 but not yet paid at death shall be paid to a surviving spouse if such spouse is entitled to an annuity under an election made pursuant to the provisions of section 5 of such Act; otherwise they shall be paid to such person or persons as the deceased may have designated by a writing filed with the Board prior to his death, or if there be no designation, to the legal representative of the deceased.

SEC. 203. Any individual who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be an employee representative as defined in such Act, and who is not eligible for an annuity under that Act but who would have been eligible for an annuity under the Railroad Retirement Act of 1937 had such Act been in force from an [1] after August 29, 1935, shall have his right to an annuity adjudicated under the Railroad Retirement Act of 1937: *Provided, however*, That no such annuity shall begin prior to the date of the enactment of this Act.

[1] So in original.

SEC. 204. The Railroad Retirement Act of 1935 shall continue in force and effect with respect to the rights of individuals granted annuities prior to the date of the enactment of this Act.

SEC. 205. The enactment of this Act shall have no effect on the status, tenure of office, or compensation of the present members, officers, and employees of the Railroad Retirement Board; except that individuals who have had experience in railroad service shall be retained in the employ of the Board, whether or not qualified under the civil service laws and rules, if in the judgment of the Board they possess the qualifications necessary for the proper discharge of the duties of the positions which they are holding.

Approved, June 24, 1937.

[PUBLIC—No. 174—75TH CONGRESS]

[CHAPTER 405—1ST SESSION]

[H. R. 7589]

AN ACT

To levy an excise tax upon carriers and certain other employers and an income tax upon their employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "employer" means any carrier (as defined in subsection (i) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however*, That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Commissioner of Internal Revenue, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

(b) The term "employee" means any person in the service of one or more employers for compensation: *Provided, however*, That the

term "employee" shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after August 29, 1935. An individual is in the employment relation to a carrier if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the carrier: *Provided further*, That an individual shall not be deemed to have been on August 29, 1935, in the employment relation to a carrier not conducting the principal part of its business in the United States unless during the last pay-roll period in which he rendered service to it prior to said date, he rendered service to it in the United States.

(c) The term "employee representative" means any officer or official representative of a railway labor organization other than a labor organization included in the term "employer" as defined in section 1 (a), who before or after the enactment hereof was in the service of an employer as defined in section 1 (a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, as amended, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

(d) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: *Provided, however*, That an individual shall be deemed to be in the service of an employer not conducting the principal part of its business in the United States only when he is rendering service to it in the United States.

(e) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. Such term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of the tax imposed on such employee by section 2 of this Act. Compensation which is earned during the period for which the Commissioner of Internal Revenue shall require a return of taxes hereunder to be made and which is payable during the calendar month following such period shall be deemed to have been paid during such period only.

(f) The term "United States" when used in a geographical sense means the States, Alaska, Hawaii, and the District of Columbia.

(g) The term "company" includes corporations, associations, and joint-stock companies.

(h) The term "employee" includes an officer of an employer.

(i) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(j) The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

INCOME TAX ON EMPLOYEES

SEC. 2. (a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calendar month, earned by him after December 31, 1936—

1. With respect to compensation earned during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

3. With respect to compensation earned during the calendar years 1943, 1944, and 1945, the rate shall be 3¼ per centum;

4. With respect to compensation earned during the calendar years 1946, 1947, and 1948, the rate shall be 3½ per centum;

5. With respect to compensation earned after December 31, 1948, the rate shall be 3¾ per centum;

(b) The tax imposed by this section shall be collected by the employer of the taxpayer by deducting the amount of the tax from the compensation of the employee as and when paid. If an employee is paid compensation by more than one employer with respect to any calendar month, then, under regulations made under this Act, the Commissioner of Internal Revenue may prescribe the proportion of the tax to be deducted by each employer from the compensation paid by him to the employee with respect to such month. Every employer required under this subsection to deduct the tax is hereby made liable for the payment of such tax and shall not be liable to any person for the amount of any such payment.

(c) If more or less than the correct amount of tax imposed by this section is paid with respect to any compensation payment, then, under regulations made under this Act by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent compensation payments to the same employee by the same employer.

EXCISE TAX ON EMPLOYERS

SEC. 3. (a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however*, That if an employee is paid compensation by more than one employer with respect to any such calendar month, the tax imposed by this section shall apply to not more than $300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each such employer shall be liable for that proportion of the tax with respect to such compensation which his payment to the employee with respect to such calendar month bears to the aggregate compensation paid to such employee by all employers with respect to such calendar month:

1. With respect to compensation paid to employees for services rendered during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

2. With respect to compensation paid to employees for services rendered during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

3. With respect to compensation paid to employees for services rendered during the calendar years 1943, 1944, and 1945, the rate shall be 3¼ per centum;

4. With respect to compensation paid to employees for services rendered during the calendar years 1946, 1947, and 1948, the rate shall be 3½ per centum;

5. With respect to compensation paid to employees for services rendered after December 31, 1948, the rate shall be 3¾ per centum.

(b) If more or less than the correct amount of the tax imposed by this section is paid with respect to any compensation payment, then, under regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, proper adjustments with respect to the tax shall be made, without interest, in connection with subsequent excise-tax payments made by the same employer.

REFUNDS AND DEFICIENCIES

SEC. 4. If more or less than the correct amount of the tax imposed by section 2 (a) or 3 (a) of this Act is paid or deducted with respect to any compensation payment and the overpayment or underpayment of the tax cannot be adjusted under section 2 (c) or 3 (b), the amount of the overpayment shall be refunded, or the amount of the underpayment shall be collected in such manner and at such times (subject to the statute of limitations properly applicable thereto) as may be prescribed by regulations under this Act as made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

INCOME TAX ON EMPLOYEE REPRESENTATIVES

SEC. 5. In addition to other taxes, there shall be levied, collected, and paid upon the income of each employee representative a tax equal to the following percentages of so much of the compensation of such employee representative as is not in excess of $300 for any calendar month, earned by him after December 31, 1936:

1. With respect to compensation earned during the calender years 1937, 1938, and 1939, the rate shall be 5½ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 6 per centum;

3. With respect to compensation earned during the calendar years 1943, 1944, and 1945, the rate shall be 6½ per centum;

4. With respect to compensation earned during the calendar years 1946, 1947, and 1948, the rate shall be 7 per centum;

5. With respect to compensation earned after December 31, 1948, the rate shall be 7½ per centum.

The compensation of an employee representative for the purpose of ascertaining the tax thereon shall be determined in the same manner and with the same effect as if the employee organization by which such employee representative is employed were an employer as defined in section 1 (a) of this Act.

DEDUCTIBILITY FROM INCOME TAX

SEC. 6. For the purposes of the income tax imposed by title I of the Revenue Act of 1936 or by any Act of Congress in substitution therefor, the taxes imposed by sections 2 and 5 of this Act shall not be allowed as a deduction to the taxpayer in computing his net income.

COLLECTION AND PAYMENT OF TAXES

SEC. 7. (a) The taxes imposed by this Act shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue collections.

(b) The taxes imposed by this Act shall be collected and paid quarterly or at such other times and in such manner and under such conditions not inconsistent with this Act as may be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. If a tax imposed by this Act is not paid when due, there shall be added as part of the tax (except in the case of adjustments made in accordance with the provisions of this Act) interest at the rate of 6 per centum per annum from the date the tax became due until paid.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, insofar as applicable and not inconsistent with the provisions of this Act, shall be applicable with respect to the taxes imposed by this Act.

(d) In the payment of any tax under this Act, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

(e) Any tax paid under this Act by a taxpayer with respect to any period with respect to which he is not liable to tax under this Act shall be credited against the tax, if any, imposed by title VIII of the Social Security Act upon such taxpayer, and the balance, if any, shall be refunded. Any tax paid under title VIII of the Social Security Act by a taxpayer with respect to any period with respect to which he is not liable to tax under such title VIII shall be credited against the tax, if any, imposed by this Act upon such taxpayer, and the balance, if any, shall be refunded.

COURT JURISDICTION

SEC. 8. The several district courts of the United States and the District Court of the United States for the District of Columbia, respectively, shall have jurisdiction to entertain an application by the Attorney General on behalf of the Commissioner of Internal Revenue to compel an employee or other person residing within the jurisdiction of the court or an employer subject to service of process within its jurisdiction to comply with any obligations imposed on such employee, employer, or other person under the provisions of this Act. The jurisdiction herein specifically conferred upon such Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

SOCIAL SECURITY ACT

SEC. 9. (a) The term "employment", as defined in subsection (b) of section 811 of title VIII of the Social Security Act, shall not include service performed by an individual as an employee as defined in section 1 (b) or service performed as an employee representative as defined in section 1 (c).

(b) The Secretary of the Treasury at intervals of not longer than three years shall estimate the reduction in the amount of taxes collected under title VIII of the Social Security Act by reason of the operation of subsection (a) of this section and shall include such estimate in his annual report.

SEPARABILITY

SEC. 10. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

REPEAL OF PRIOR TAX ACT

SEC. 11. The provisions of this Act are in substitution for the provisions of the Act of August 29, 1935, as amended, entitled "An Act to levy an excise tax upon carriers and an income tax upon their employees, and for other purposes", which is hereby repealed. All moneys payable as and for taxes under such Act of August 29, 1935, and not heretofore paid shall cease to be payable and all proceedings pending for the recovery of any such moneys shall be terminated. All sums paid into the Treasury of the United States as and for taxes under such Act shall be refunded, except so much of the sums so paid as and for taxes with respect to compensation earned after December 31, 1936, as equals the taxes imposed by this Act with respect to the same persons and the same period, and the sums not required to be so refunded shall be retained in the Treasury of the United States and credited on taxes due and payable under this Act. All sums deducted by employers from the compensation of employees as and for taxes under such Act of August 29, 1935, which have not been paid into the Treasury of the United States shall be repaid by such employers to such employees, except so much of the sums so deducted as and for taxes in respect of compensation earned after December 31, 1936, as equals the taxes imposed and required to be deducted by this Act with respect to the same persons and the same period, and the sums not required to be so repaid shall be paid into the Treasury of the United States and thereupon shall be credited on taxes due and payable under this Act. No interest shall be allowed or paid with respect to any sum refunded, credited, or repaid under the provisions of this section.

RULES AND REGULATIONS

SEC. 12. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish such rules and regulations as may be necessary for the enforcement of this Act.

SHORT TITLE

SEC. 13. This Act may be cited as the "Carriers Taxing Act of 1937".

Approved, June 29, 1937.

BLANK

PAGE

BLANK

PAGE

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

California owns the railroad along the San Francisco water front known as State Belt Railroad, and operates it in interstate commerce. *Sherman* v. *United States*, 282 U. S. 25; *United States* v. *California*, 297 U. S. 175. On leave granted, the State filed in this Court this bill against the members of the Railroad Retirement Board and the Commissioner of Internal Revenue, individually and in their official capacities, to enjoin them from enforcing against that railroad provisions of the Acts of Congress known as the Railroad Retirement Acts of 1935 and 1937 [1] and of the Carriers Taxing Act of 1937.[2]

The bill recites that California has a State Employees' Retirement system sustained by a fund to which the State and its employees contribute; and that all the persons employed in the operation of State Belt Railroad are members of that retirement system and are entitled to pensions thereunder, unless they are members of a retirement system supported wholly, or in part, by funds of the United States; that the three Acts of Congress named have for their sole purpose the establishment of a pension system of annuities and other benefits for employees of interstate railroads; and that the federal system is sustained by taxes imposed by the Carriers Taxing Act. The bill asserts, apparently, that as a matter of statutory construction, the federal system is not applicable to the employees of State Belt Railroad; and apparently that if construed as applicable to them, the legislation is unconstitutional. The bill charges that the Railroad Retirement Board has threatened to require the complainant to gather and keep records concerning the

[1] Act of August 29, 1935, c. 812, 49 Stat. 967, as amended June 24, 1937, c. 382, Part I, 50 Stat. 307, 45 U. S. C., § 228a-r (1937 Supp.).

[2] Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U. S. C., §§ 261–73 (1937 Supp.).

employees of the State Belt Railroad, which would subject it "to great expense"; and that the Board "will enforce against the complainant, its officers, agents, and employees certain penalties if it refuses" to do so. The bill charges, also, that the Commissioner of Internal Revenue has threatened to enforce taxes, under the Carriers Taxing Act, and will subject it to heavy fines and penalties if it fails to pay the same. The relief prayed is that the three Acts of Congress be declared inapplicable to State Belt Railroad; that the members of the Railroad Retirement Board be enjoined, among other things, from requiring the railroad to assemble and furnish the information requested; and that the Commissioner of Internal Revenue be enjoined from enforcing collection of the taxes claimed.

The defendants moved to dismiss the bill, assigning therefor nine grounds. We need consider only the objection that the bill is without equity.[3] For we are of opin-

[3] This objection was the basis of two of the reasons given in support of the motion to dismiss. The other seven are: (1) The individual citizenship of defendants can form no basis for the original jurisdiction of the Court. The defendants can and will act only as officials of the United States; and as officials they are citizens of no state. (2) The Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad have not been joined as defendants. They are indispensable parties in whose absence the Court should not proceed. (3) The cause is not maintainable in this Court, since the Collector of Internal Revenue for the First District of California, a citizen of California, should be made a party, and to join him would deprive the Court of original jurisdiction. (4) The cause is not maintainable in this Court, since the employees of the State Belt Railroad, citizens of California, should be made parties, and to join any of them would deprive the Court of original jurisdiction. (5) Maintenance of the suit is prohibited by Section 3224 of the Revised Statutes. (6) The United States is the real party in interest and hence an indispensable party. (7) The issues presented by complainant have been clearly decided against it by previous decisions of this Court, and a re-examination of those contentions would serve no useful purpose.

ion that there was adequate opportunity to test at law the applicability and constitutionality of the Acts of Congress; and that no danger is shown of irreparable injury if that course is pursued.

First. The alleged threat of the Railroad Retirement Board to require State Belt Railroad to gather and keep records of its employees does not expose it to irreparable injury. The Railroad Retirement Act of 1937 provides:

"Sec. 8. Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of monthly compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their monthly compensation as reported to the Board. . . .

"Sec. 10 (b) 4. . . . The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section . . ."

"Sec. 13. Any officer or agent of an employer . . . who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (b) 4, by the Board . . . shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year."

The only "threats" made against the complainant in connection with these sections is a ruling by the Railroad Retirement Board that the State Belt Railroad is subject to the Railroad Retirement Acts. No specific action in relation to that railroad appears to have been taken

by the Board.[4] Regulations have been prescribed under §§ 8 and 10 which are simple and of a type which can be complied with largely by transcriptions from payrolls.[5] The bill alleges that compliance with the regulations would subject the State "to great expense." No supporting detail or specification is given. Such a general statement is not an adequate basis for relief on the ground of irreparable damages.[6] The trifling expense of temporarily complying with the regulation until the applicability of the Act shall have been judicially determined, like the expense of the administrative hearings complained of in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51, and *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U. S. 209, 220, 221, is not sufficient to support the claim of irreparable injury indispensable to interposition by injunction. Compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95, 96.

Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, as provided in § 10 (b) 4; and in any suit which it may institute to enforce the regulations[7] ample opportunity is afforded to defend, on the ground that State Belt Railroad is not subject to the Railroad Retirement Acts. It is contended

[4] Compare *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699, 701; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 367–68; *State Corporation Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 568–69.

[5] 3 Federal Register, p. 22 *et seq.* (promulgated December 31, 1937), 3 Federal Register, p. 218 (promulgated January 17, 1938), in effect at the time leave to file the bill of complaint was granted, May 16, 1938, later superseded by 3 Federal Register, pp. 1478, 1493 *et seq.*, Part 50 (promulgated May 31, 1938).

[6] Compare *Shelton* v. *Platt*, 139 U. S. 591, 596; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 81; *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 690; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 285.

[7] Compare *Cavanaugh* v. *Looney*, 248 U. S. 453; *Fenner* v. *Boykin*, 271 U. S. 240; *Hurley* v. *Kincaid*, 285 U. S. 95.

that the possible penalty, in case of a prosecution under § 13, is so serious as to prevent the opportunity to defend from being an adequate remedy. Compare *Ex parte Young,* 209 U. S. 123, 165. No prosecution has been instituted or threatened. And authority to institute such a proceeding rests not with the Railroad Retirement Board, but with the United States Attorney for the Northern District of California, who is not made defendant in this suit.[8] Furthermore, it may be doubted whether a refusal to comply with the regulation would be deemed willful, if based on an honest belief that the Act is not applicable to a railroad operated by the State. Compare *United States* v. *Murdock,* 290 U. S. 389, 394–396.

Second. The alleged threat of the Commissioner of Internal Revenue to require payment of the tax does not show danger of irreparable injury. The only threat alleged is the ruling that the Carriers Taxing Act is applicable to this railroad—a ruling made in answer to an enquiry by the Attorney General of the State. The tax for the year is $7,862.32 payable by the State Belt Railroad; and an equal amount payable by the employees to be deducted by it from their compensation. Payment of the tax would not expose the State to irreparable injury,[9] since the amount paid with interest could be recovered if not due. Payment followed by proceedings to recover the amount would involve some delay, as an action at law to recover the sum paid could not be instituted until six months after making the claim for refund, if the Commissioner should fail to act earlier upon it.[10] Such possible delay, it is urged, is a special circumstance which justifies resort to a suit for an injunction in order that the ques-

[8] Compare *Federal Trade Comm'n* v. *Claire Furnace Co.,* 274 U. S. 160, 173–74; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 620–22.

[9] *Dows* v. *Chicago,* 11 Wall. 108. See also cases in Note 6.

[10] R. S. § 3226, as amended by § 1103, Revenue Act of 1932.

tion of liability may be promptly determined. If the delay incident to such proceedings justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal,[11] could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax.

It is urged that in order to raise the money with which to pay the State's portion of the tax, it would be necessary to readjust the tariffs of State Belt Railroad; and that the deduction of the employees' portion from the payroll would result in a multiplicity of suits by employees to recover the amounts and to reëstablish their rights and privileges under the laws of the State. The meagre statements of the bill do not convince us that the apprehension alleged is well founded. The State Employees Retirement Act also requires the State Belt Railroad to make deductions from the salaries of its employees. The bill does not show the precise relationship between the amounts required to be deducted by the state and federal acts, or even, if the amount of the federal deduction is greater, that it is impossible for the State Belt Railroad to work out with its employees a way of adjusting its affairs during the period of uncertainty as to which act is applicable. Mere inconvenience to the taxpayer in raising the money with which to pay taxes is not uncommon, and is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of the tax. For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested.

Bill dismissed.

[11] See cases under Note 6.